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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-274

No. ~~1819~~

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—against—

NORTHWEST AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1970

No.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—against—

NORTHWEST AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Air Line Pilots Association, International respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled action on April 15, 1971.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit on ALPA's petition for rehearing and reconsideration, dated April 15, 1971, is not yet officially reported. The opinion appears unofficially at 65 CCH LC ¶ 11,691 and 77 LRRM 2116. It is set forth at Appendix A. The initial opinion and order of the Eighth Circuit Court of Appeals, dated December 3, 1970, is not yet officially reported. The opinion appears unofficially at 65

CCH LC ¶ 11,690 and 77 LRRM 2102. It is set forth at Appendix B.

The opinion of the United States District Court for the District of Minnesota, dated December 22, 1970, is not yet officially reported. The opinion appears unofficially at 77 LRRM 2105. It is set forth at Appendix C. The District Court's initial Order Denying Preliminary Injunction, dated December 2, 1970, is not officially or unofficially reported. It is set forth at Appendix D.

Jurisdiction

The judgment sought to be reviewed was dated and entered in the United States Court of Appeals for the Eighth Circuit on April 15, 1970 upon rehearing. The Court of Appeals had previously entered its original Order in this litigation on December 3, 1970 upon a motion for an injunction pending appeal. The jurisdiction of this Court to review that judgment by writ of certiorari is invoked under 28 U.S.C. § 1254(1).

Question Presented for Review

Does federal labor law under the Norris-LaGuardia Act and Railway Labor Act permit an injunction against concerted activity by Northwest Airlines pilots represented by ALPA to respect lawful primary picket lines established by other Northwest employees represented by another union during a legal strike, in the absence of any no-strike contract clause or any other clause in the existing pilot agreement on the subject of respecting picket lines?

Statutory Provisions Involved

This case involves Sections 1, 2, 4, 7, 8 and 9 of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* The case also involves Sections 2, 5, 6 and 204 of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* These statutory provisions are set forth at Appendix E.

Statement of the Case

Air Line Pilots Association, International ("ALPA") is the national pilot representing organization. ALPA has represented the pilots employed by Northwest Airlines, Inc. ("NWA" or the "Company") and maintained collective bargaining agreements with NWA for many years. Neither the current pilot agreement nor any predecessor agreements contain a "no-strike" clause or any other clause on honoring picket lines.

On July 8, 1970, NWA's clerical, office and passenger service employees represented by the Brotherhood of Railway, Airline and Steamship Clerks ("BRAC") began a legal strike after exhausting the mandatory negotiation and mediation procedures of the Railway Labor Act. BRAC established lawful primary picket lines at NWA facilities. As a result of the strike, NWA furloughed approximately 1400 pilots, while about 400 pilots continued to fly NWA's limited remaining schedules.

On November 24, 1970, after prior similar notice, ALPA advised NWA that, effective November 27, all NWA pilots would exercise their right to respect BRAC picket lines and not operate NWA aircraft during the BRAC strike. NWA then sought immediate injunctive relief in the United States District Court for the District of Minnesota.

District Court Proceedings—Injunctive Relief Denied

On November 26, the District Court entered a temporary restraining order against pilot respect for BRAC picket lines. The District Court noted "a substantial probability that the position of Northwest cannot be sustained" and ordered a preliminary injunction hearing on December 2. Following the December 2 hearing, the District Court denied NWA's motion for a preliminary injunction and dissolved its temporary restraining order effective December 4.

The District Court Order (App. D) was based on the failure of NWA to show "substantial probability of success on the merits." (App. 2d).* In his subsequent memorandum opinion (App. C), District Judge Larson recognized the Congressional intent in the Railway Labor Act to delay strikes through statutory negotiation and mediation procedures, but not to diminish the effectiveness of the strike by limiting its economic impact or the right to respect legal picket lines. Judge Larson said in part:

> "Although Congress clearly intended, when it enacted the Railway Labor Act, to delay utilization of the strike as a means of obtaining economic gains, there is no indication that there was any intent to diminish its effectiveness once resorted to. An examination of the structure of the Act demonstrates that diminishing the effectiveness of the strike would be at cross purposes with the 'major dispute' bargaining provisions in the Act. Congress could have substituted arbitration for the negotiation-mediation provisions set forth for 'major disputes' just as it did for 'minor disputes.' Congress chose not to. There is no explicit limitation on the conduct of a strike once negotiations and mediation pursuant to the Act have failed to resolve the issues. As a practical

* App. refers to "Appendix."

matter it is the existence of the right to ultimately conduct an effective strike which creates employee bargaining power during the negotiation-mediation process. It is only the awareness that he may be the object of an effective economic strike if resolution of issues is not achieved by mutual agreement that compels an employer to bargain seriously with the union. Furthermore, it is highly unlikely that Congress would abrogate the union's right to strike without providing an alternative method to compel resolution of issues. Within the Railway Labor Act itself there is evidence that this is true. The 1926 Act contained the distinction between 'major' and 'minor' disputes. However, it did not provide for compulsory arbitration of the latter. Congress in 1934 because of threatened disruptions in carrier service caused by 'minor disputes' withdrew the right to strike in that context. However, it substituted, for the right to exercise economic coercion, the decision making process of a neutral body binding on both parties to the dispute.

The possibility is remote at best that Congress intended the 'minor dispute' provisions to be interpreted in a manner that would substantially reduce the effectiveness of a legal strike over a 'major-dispute' without providing an alternative method for final settlement of the dispute. An employer being aware of the inability of the union to mount an effective strike without the support of sister unions might be tempted to wait for the strike and break the union. *Cf. Railway Clerks* v. *Florida E.C. Ry.*, 384 U.S. 238, 245 (1965) (hereinafter F.E.C.).

The Supreme Court's approach has clearly been to interpret the Act in order to allow free play of economic power once self-help is reached. This has been carried to the extent of holding inapplicable sections of the Railway Labor Act which if enforced once the point of a strike had been reached would have serious-

> ly impaired the carrier's right to engage in self-help. *F.E.C., supra.* In another case the Court permitted picketing by the striking union which arguably would have been proscribed under the NLRA as secondary in nature because Congress did not clearly indicate that secondary picketing was illegal under the Railway Labor Act. *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969) * * *." (App. 13c-14c).

In response to NWA's argument that the pilots were required to exhaust the procedures of Section 2, First and related sections of the Railway Labor Act before respecting BRAC picket lines, Judge Larson concluded:

> "This position comes perilously close to making it illegal as a matter of law for employees under the Railway Labor Act to conduct an effective strike. If the honoring of picket lines will effectively shut down the carrier, the position of NWA is that such an action must be enjoined as a violation of a positive duty imposed by Section 2 (First) of the Act. However, this reasoning seems equally applicable if the pilots rather than BRAC were involved in the underlying 'major dispute.' Would NWA then maintain that ALPA has an obligation to conduct an ineffective strike, that the pilots could not completely withhold their services because to do so would involve an interruption of carrier service? It is impossible for this Court to assume such a posture in light of the prior discussion concerning the Act and its interpretation by the Supreme Court.
>
> An exception carved out for the union that has the 'major dispute' with the employer would appear to this Court to be a senseless one. It would permit violation of a duty which NWA claims controls all other work stoppage fact situations, including the

> instant one, and would accomplish nothing except to discriminate in favor of those unions which have the capacity to shut down an employer without the aid of sister unions. There is no sound policy reason to create disparate bargaining power, as a matter of law, between different classes of employees under the Act." (App. 21c-22c).

Judge Larson also found that the right to respect picket lines during a lawful strike was incorporated in the Railway Labor Act by Congress:

> "The right to honor a picket line is not an immutable principle of law nor a clearly protected constitutional right. Congress has the power to take it away. However, in the Railway Labor Act, Congress incorporated the right to strike into a scheme of labor legislation and it is apparent that the viability of the bargaining procedure in that scheme rests to a large extent on the knowledge of the parties that it will be an effective strike when ultimately resorted to. Under these circumstances the Courts should not place any limitation on peaceful conduct of strikes absent a clear and unequivocable indication by Congress that they should do so." (App. 23c-24c).

Summarizing its conclusions on the honoring of legal picket lines, the District Court outlined the following:

> "1. The refusal by ALPA to cross BRAC's legal picket lines is concerted activity arising ultimately out of the 'major dispute' underlying the strike by BRAC.
>
> 2. Section 2 (First) of the Railway Labor Act cannot be interpreted to create a flat prohibition of any action which will interfere with carrier service.

> 3. The refusal by ALPA to cross BRAC picket lines, arising out of a legitimate strike over a 'major dispute' does not create a 'minor dispute' within purview of the Railway Labor Act absent a specific no-strike clause in the ALPA collective bargaining agreement with NWA. To consider the refusal as such would greatly diminish the effectiveness of the legitimate strike, a result at cross purposes with the 'major dispute' provisions of the Railway Labor Act and inconsistent with recent Supreme Court cases interpreting the Act." (App. 28c).

The District Court found that "[u]nder such circumstances the Norris-LaGuardia Act removes the jurisdiction of this Court from enjoining ALPA from honoring BRAC picket lines." (App. 29c).

Court of Appeals Proceedings

On December 3, hours before the set time for respecting BRAC picket lines, the Eighth Circuit held an emergency session on NWA's motion for an injunction pending appeal. That evening, the Eighth Circuit enjoined the NWA pilots from honoring BRAC picket lines and directed expedited proceedings before the NWA-ALPA System Board of Adjustment on the rights of NWA pilots to respect the picket lines. In reaching these conclusions, the Court, in the absence of any contract clause on the subject and in direct contrast to the District Court, found that the case presented a "minor dispute." (App. B).

Pursuant to this Order, the parties selected a neutral, Father Leo C. Brown, and commenced hearings before the System Board on Friday, December 11, 1970. On Saturday, December 12, following confirmed announcements of a tentative settlement of the BRAC strike subject to a ratification

vote to be held the next day, ALPA formally withdrew its prior notice to respect BRAC picket lines. The BRAC membership then ratified the agreement reached with NWA, the strike ended, and all picket lines on the property were withdrawn.

On January 12, 1971, the Eighth Circuit Court of Appeals granted a petition for rehearing filed by ALPA. ALPA contended that the entire case had been mooted by the settlement of the underlying labor dispute. ALPA also argued, in the alternative, that the case presented issues of statutory interpretation of the Norris-LaGuardia Act and Railway Labor Act suitable for determination by the federal Courts rather than a System Board of Adjustment, and that the federal Courts could not issue injunctive relief against pilot exercise of the fundamental employee right to respect lawful primary picket lines.

On April 15, the Eighth Circuit denied upon rehearing ALPA's contentions that the case had been mooted (except to the extent that ALPA would not be enjoined from respecting non-existing picket lines). The Court of Appeals further confirmed its earlier decision on the merits, and directed continuation of the proceedings before the System Board of Adjustment. (App. A). This mandate has been stayed by the Eighth Circuit pending filing of ALPA's Petition for a Writ of Certiorari.

Reasons for Granting the Writ

This case presents for review labor law questions concerning fundamental rights of all employees subject to the Railway Labor Act and Norris-LaGuardia Act. Entry of a preliminary injunction order by the Court of Appeals

preventing ALPA and the NWA pilots from exercising the basic and long recognized employee right to concerted respect for lawful, primary "major dispute" picket lines of other striking employees, together with ordering determination of such rights before the System Board of Adjustment in the absence of any contract clause on the subject, raises important issues on the application of the clear jurisdictional proscriptions of the Norris-LaGuardia Act, the fundamental rights of labor organizations under the Railway Labor Act, and the proper role of a federal Court of Appeals in reviewing a District Court's denial of temporary injunctive relief, which have not, but should be finally settled by this Court. The issues are particularly important and relevant to airline employees, in a practical economic and collective bargaining sense, when viewed in the context of collective bargaining under the aegis of the multi-airline Mutual Aid Pact, under which struck carriers receive substantial monetary payments from other member airlines, and the newly formed Airline Industrial Relations Conference ("AIRCO"), estabished for joint airline collective bargaining activity.

The Court of Appeals decision is also inconsistent with principles on the rights of employees to establish and honor picket lines which are implicit in decisions of this Court. In addition, there is a direct conflict between the decision of the Eighth Circuit and a Fifth Circuit decision on the same question of rights of non-striking employees to honor legal picket lines. The Eighth Circuit decision is moreover inconsistent with the statutory collective bargaining structure mandated by Congress for airline and railroad employees.

ARGUMENT

Does Federal Labor Law under the Norris-LaGuardia Act and Railway Labor Act permit an injunction against concerned activity by Northwest Airlines Pilots represented by ALPA to respect lawful primary picket lines established by other Northwest employees represented by another union during a legal strike, in the absence of any no-strike contract clause or any other clause in the existing pilot agreement on the subject of respecting picket lines?

Statutory Framework

Section 1 of the Norris-LaGuardia Act declares that the federal courts are deprived of jurisdiction to issue injunctions in labor disputes "except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act." Section 2 of the Norris-LaGuardia Act declares "the public policy of the United States" to be in favor of collective bargaining, as opposed to restraints on concerted activity by employees. Section 4 flatly prohibits certain types of injunctions, among which are orders against "Ceasing or refusing to perform any work or to remain in any relation of employment." Section 7 imposes further limitations against labor injunctions, including the requirement of "findings of fact by the court, to the effect—(a) That unlawful acts have been threatened and will be committed unless restrained * * *." (App. E).

This Court has previously held that the prohibitions against labor injunctions embodied in Norris-LaGuardia must be read together or accommodated with the collective bargaining procedures of the Railway Labor Act "so that

the obvious purpose in the enactment of each is preserved." *Bhd. of Railroad Trainmen* v. *Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 40 (1957). In "major disputes," injunctions are issued for only one purpose: to effectuate and preserve adherence by the parties to the collective bargaining process established by Congress. *Order of Railroad Telegraphers* v. *Chicago & North Western Ry. Co.*, 362 U.S. 330, 338-339 (1960).

The pilot notice to honor BRAC picket lines was an exercise of the well-recognized traditional right of employees to respect lawful primary picket lines established during a legal strike. This basic trade union right to honor picket lines is protected by the Railway Labor Act and Norris-LaGuardia Act as legitimate concerted activity growing directly out of and involved in the existing "labor dispute." Unlike some other employee groups, the NWA pilots have never agreed, through a "no strike" clause or any other provision in the pilot agreement, to restrict their statutory right to respect picket lines.

As recognized by the District Court (App. C), this right is particularly important in an economic sense to meaningful collective bargaining and an effective strike. It is, moreover, particularly important that these economic consequences be given appropriate recognition by the federal judiciary in strike situations, where the very essence of the dispute at the bargaining table often turns on the ability of the striking employees to maintain effective picket lines which are not crossed by fellow employees represented by other labor orgainzations.

Eighth Circuit Decision Inconsistent With Principles in Supreme Court Decisions

Even temporary injunctions have such a devastating effect on the rights of employees that this Court has stated, in the context of National Labor Relations Act rights:

> "The truth is that authorizing the issuance of a temporary injunction, as is frequently true of temporary injunctions in labor disputes, may effectively dispose of petitioner's rights and render entirely illusory his right to review as well as his right to a hearing before the Labor Board." *Local No. 438, Construction Union* v. *S.J. Curry,* 371 U.S. 542, 550 (1963).

In flatly denying the rights of ALPA and the NWA pilots to honor picket lines by finding the existence of an enjoinable "minor dispute," the Eighth Circuit decision is inconsistent with recent decisions of this Court recognizing the total range of economic self-help and picket line activity available to employees in "major disputes" arising under the Railway Labor Act. The Supreme Court has clearly stated that in such situations the employees are free to strike and to picket the primary employer to induce fellow employees, and even employees of other employers, not to cross picket lines. See *Bhd. of Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369 (1969); *Bhd. of Railroad Trainmen* v. *Atlantic C.L.R.R. Co.,* 383 U.S. 20 (1966); *Bhd. of Railway Clerks* v. *Florida E.C.R. Co.,* 384 U.S. 238 (1966).

Implicit in these Supreme Court decisions is the corollary right of non-striking employees to honor those picket lines. As discussed by the District Court (App. C), the right to picket for the very purpose of inducing others to respect the picket lines and withhold their services is emasculated in

an economic sense by depriving non-striking employees through an injunction of the right to honor those same picket lines.

Moreover, in *Jacksonville Terminal Co., supra.*, in resorting to the Taft-Hartley Act "for assistance in construing the Railway Labor Act," the Supreme Court stated there was "no possible grounds for distinguishing picketing under the Railway Labor Act. Peaceful primary strikes and picketing incident thereto lie within the core of protected self-help under the Railway Labor Act." 394 U.S. at 383-386.

Direct Conflict Between Eighth and Fifth Circuit Decisions

In addition to inconsistency with principles set forth by this Court, the Eighth Circuit decision directly conflicts with the decision of the Fifth Circuit in *Bhd. of Locomotive Firemen and Enginemen* v. *Florida East Coast Ry.*, 346 F.2d 673 (5th Cir. 1965). In that case, the Fifth Circuit Court of Appeals reversed, as invalid under the Norris-LaGuardia Act, a District Court injunction prohibiting employees of a county port authority from refusing to cross railroad employees' picket lines. Noting that the case "involves or grows out of a labor dispute at F.E.C.," the Fifth Circuit held that the "Authority's employees are interested in the dispute in that they are members of the same trade or industry as the striking F.E.C. workers * * * and desire to make common cause with them by honoring their lawful picket lines." 346 F.2d at 675.* Similarly, in *North-*

* See also *Chicago & Illinois Midland R.R.* v. *Bhd. of R.R. Trainmen*, 315 F.2d 771 (7th Cir. 1963), where a divided Court upheld injunctive relief under similar circumstances, on the basis of Interstate Commerce Act provisions, while the dissent urged that jurisdiction was barred under Norris-LaGuardia because of the absence of a minor dispute.

west Airlines v. *Transport Workers Union,* 190 F. Supp. 495 (W.D. Wash. 1961), a federal District Court refused to enjoin employees from honoring the lawful picket lines of another union in the absence of a no-strike clause. Both the Fifth Circuit and Washington District Court, like the Minnesota District Court here, found that the employees retained the right to respect lawful picket lines in the absence of any contract clause precluding this concerted activity. Thus, in those cases which most closely parallel the facts in the instant action, the Courts have found lack of jurisdiction to issue injunctions.

Eighth Circuit Decision Inconsistent With Statutory Collective Bargaining Structure

The Eighth Circuit decision is based on the concept that the proposed pilot refusal to cross picket lines somehow presents a "minor dispute," in direct contrast to the District Court conclusion that no "minor dispute" existed in the absence of any contract language dealing with the subject. While a union may be enjoined from striking over a grievance which is genuinely subject to System Board determination, *Bhd. of Railroad Trainmen* v. *Chicago River & Indiana R.R. Co., supra,* no legitimate comparison can be made between that type of case and the instant dispute, where NWA sought a System Board determination for interpretation of non-existent contract language solely as a device for obtaining otherwise unavailable injunctive relief. In this respect, the Eighth Circuit decision does not advance administration of Section 204 of the Railway Labor Act through appropriate use of System Boards, ignores the plain jurisdictional proscriptions of the Norris-LaGuardia Act, and raises serious questions on the very essence and

purpose of written collective bargaining agreements made under the Railway Labor Act. As such, it should not be allowed to stand. Moreover, in effectively denying the pilots a right to honor lawful picket lines, in the absence of any clause in the pilot agreement even remotely suggesting that this right had been bargained away, the decision has wide-reaching effects for all employees subject to the Railway Labor Act.

The Eighth Circuit decision is also contrary to the well-established concept that the federal Courts have the obligation to decide cases involving federal statutory rights arising under the Norris-LaGuardia Act and the Railway Labor Act, regardless of the national policy favoring arbitration of genuine grievances. It is particularly noteworthy that the statutory rights central to this litigation are fundamental rights which can be of pivotal economic importance during a strike. The Eighth Circuit order directing that the System Board of Adjustment determine these rights of ALPA—in the complete absence of any language in the pilot agreement—gives judicial recognition to the well recognized management tactic of asserting a "minor dispute" to obtain injunctive relief. See *Detroit and Toledo Shoreline R.R. Co. v. United Transportation Union*, 396 U.S. 142 (1969); *United Industrial Workers v. Board of Trustees*, 351 F.2d 183, 189, note 25 (5th Cir. 1965). The statement of the Eighth Circuit (App. 7a) that the Court is not asking the System Board "to undertake an improper function" of interpreting federal statutes is of little meaning in a case where there is no contract clause for the System Board to study or construe and where NWA is arguing before the System Board that the so-called "implied" contract clause to be read into the pilot agreement

exists by reason of a statutory proscription and national labor policy against honoring lawful primary picket lines.

Primary picketing rights, which include the traditional right to honor picket lines, are an interwoven part of the statutory bargaining fabric existing under the Norris-LaGuardia Act and the Railway Labor Act. These basic statutory rights cannot appropriately be litigated through reference to the System Board, particularly where the "minor dispute" is advanced by the carrier as a bootstrap for temporary injunctive relief.

CONCLUSION

The outcome of this case is of vital importance to the pilots and the continuation of collective bargaining relationships within the statutory framework mandated by Congress. The pilots seek only recognition of long and well-established rights which have been exercised by trade unions since enactment of the Railway Labor Act and Norris-LaGuardia Act.

Congress recognized long ago that injunctions could not settle labor disputes. To avoid the bitterness and chaos which had prevailed, and to insure employees of the right to meet their employer on equal bargaining terms, Congress established a collective bargaining structure and deprived the federal Courts of jurisdiction to prevent peaceful concerted employee action in labor disputes.

It is black letter labor law that the federal Courts have no jurisdiction to issue injunctive relief, except upon an actual showing of a clear and convincing violation of the Railway Labor Act and upon specific findings of unlawful conduct made in accordance with the "strict conformity"

and "public policy" of the Norris-LaGuardia Act. The Courts are deprived of jurisdiction even though the parties may be involved in an economic struggle detrimental to their vital interests and despite what might result from a normal balancing of equities. The command of the law is that labor disputes must be worked out and settled without judicial intervention.

In the end, it is only negotiations and agreement which can settle a collective bargaining dispute. Parties who have lived with each other for many years, and previously reached agreement, will reach agreement again if they both fully understand that the entire structure of federal labor law will be observed. Congress has determined that this structure, in the absence of judicial intervention, is the means by which the parties must reach agreement.

The fundamental right to honor a lawful primary picket line presents an issue of statutory interpretation and Congressional intent for determination by the federal judiciary, rather than the System Board arbitration process where the expertise of the pilot System Board members, Company System Board members and neutral is in deciding grievances arising under the provisions of the agreement.

The issues presented by this case involve basic questions of national labor relations policy under the Railway Labor Act and the Norris-LaGuardia Act. At stake are the rights not only of the NWA pilots, but of all employees under the Railway Labor Act. For these and for the foregoing rea-

sons, it is respectfully urged that the Supreme Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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June 14, 1971

APPENDIX A

Opinion of the United States Court of Appeals for the Eighth Circuit on Rehearing, decided April 15, 1971

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 20,677

NORTHWEST AIRLINES, INC.

Appellant,

v.

THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA UPON REHEARING.

[April 15, 1971.]

Before:

VAN OOSTERHOUT, HEANEY and BRIGHT,

Circuit Judges.

PER CURIAM.

This matter is before us on the Air Line Pilots Association's petition for rehearing and reconsideration of our decision and order of December 3, 1970. *Northwest Air-*

Appendix A—Opinion of the United States Court of Appeals for the Eighth Circuit on Rehearing, decided April 15, 1971

lines, Inc. v. *The Air Line Pilots Association, International,* No. 20,677 — F.2d — (8th Cir. 1971).

A brief resume of the developments since December 3, will be helpful in understanding the issues raised.

ALPA promptly complied with the order of this Court. It joined with NWA in submitting to the System Adjustment Board the "basic" issue, "Does the collective bargaining agreement with ALPA and NWA prohibit ALPA from instructing its members to respect the picket lines of a sister union?"

On December 11, 1970, the Board commenced hearings with Father Leo C. Brown serving as the neutral and presiding member. The Board heard testimony and received evidence and position statements from the parties. On the same date, there were public announcements of a tentative settlement of the NWA-BRAC dispute.

On December 12, ALPA's notice to NWA that the Pilots would respect the BRAC picket line was withdrawn.

On December 17, ALPA notified the Board that it was petitioning this Court to reconsider its order of December 3. It asked the Board to suspend action until this Court had acted upon the petition. The Board granted the request for suspension after receiving permission from this Court to do so.

ALPA's petition for rehearing urges (1) that final settlement of the BRAC strike and withdrawal of BRAC picket lines has rendered this case and all issues in it

moot, and, alternatively (2) that we erred in overruling the trial court and granting injunctive relief to NWA.

At the outset, we must bear in mind that ALPA is here on a petition for rehearing. However dormant the underlying controversy may be now, it was live, real and important when we referred the "basic" issue to the Board in December. Although NWA's request at that time was for an injunction pending appeal, we reached the merits of the matter and referred the "basic" issue to the Board because we felt that little or no further light could be shed on the propriety of such referral by a further evidentiary hearing in the District Court. Furthermore, the public interest in an early settlement of the costly dispute was great. ALPA did not appeal our decision, but joined in submitting the "basic" issue to the Board. To simply dismiss the complaint now on the basis of mootness would not without more wipe out the legal significance of our earlier decision. Something more would be required.

We can, of course, reverse or withdraw our earlier opinion, or we can let it stand and relieve the parties from the affirmative obligations it imposed.

After considering the arguments advanced by ALPA and for the reasons set forth later in this opinion, we decline to reverse our earlier decision.

The arbitration proceedings have been halted midway and we feel it important that they be completed. The issue involved is an important one affecting public interests and has a high probability of recurring in the

future. See, *e.g., United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1945); *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, Nos. 20,407 and 20,418 — F.2d — (8th Cir. March 12, 1971); *Consumers Union of United States, Inc.* v. *Veterans Admin.*, 436 F.2d 1363 (2d Cir. 1971). The parties have agreed on an arbiter, and they have submitted testimony and memoranda in support of their positions. It is highly improbable that either party would have additional facts to submit to the arbitration board at a later date. We feel that the issue should be resolved by the System Adjustment Board free from the pressures of an on-going work stoppage. Further, the transitory nature of the labor dispute involved here makes it difficult for the federal courts to properly deal with the issues brought before it. Requiring the arbitration process to be completed now will enable us to more adequately deal with future disputes. See generally, *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610, supra; ITT Lamp Division of Int. Telephone & T. Corp.* v. *Minter*, 435 F.2d 989 (1st Cir. 1970); *Comment, Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672 (1970). *Cf., Moore* v. *Ogilvie*, 394 U.S. 814 (1969). Lastly, we believe that the immediate resolution of the contract dispute by the arbiter is of continued importance to the parties. Both the damage portion of the original action and the status of future bargaining contract negotiations between the parties are closely tied to an interpretation of the contract's effect on the activity involved here. The duty to arbitrate the contract dispute

was imposed in the midst of a real and serious controversy. For the reasons set out above, we do not believe that the subsequent strike settlement provides sufficient cause to relieve the parties of this duty.

We do, however, dissolve our injunction insofar as it imposed additional obligations on ALPA. We take the latter action because a contract has been signed by BRAC and NWA, the BRAC picket lines have been withdrawn, and ALPA has completely complied with the notice requirements of our December 3 order. Furthermore, there is nothing in this record to indicate that there is a continuing need for the injunction. See, *Boys Markets* v. *Retail Clerk's Union,* 398 U.S. 235, 26 L.Ed.2d 199, 212 (1970).

We turn now to the more important question: Did we err in requiring the parties to submit the "basic" issue to the System Adjustment Board?

When we handed down our original opinion, we did not have the benefit of the trial court's lucid memorandum nor did we have the time to consider the matter as long and as carefully as we would have desired. We have now had that opportunity and reaffirm our earlier view. We adhere to that position because we feel that it is important that parties to collective bargaining agreements submit disputes, arguably arising out of such agreements, to arbitration. This holding is grounded in the conviction that labor disputes ought to be kept out of the courts whenever possible, that arbiters are usually qualified by experi-

ence and training to decide such disputes, see, *Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711, 752 (1945), that the informality of arbitration proceedings and the leadership of the arbiter is conducive to the settlement not only of the precise dispute being arbitrated but of other differences which may be festering in the relationship between the parties, and that an arbiter is in a position to act more expeditiously, if he will,[1] than is a court.

We realize that in the IAM case, NWA made a stronger case for submitting a question similar to the one here to arbitration. *Northwest Airlines, Inc.* v. *International Association of Machinists and Aerospace Workers, AFL-CIO,* No. 20,662, — F.2d — (8th Cir. 1971). There, the collective bargaining agreement contained an explicit "no strike" clause that had been interepreted in the past by the union to prohibit the conduct complained of. Here, a "no strike" clause must be implied from a consideration of the collective bargaining agreement in its entirety and the history of that bargaining. But the fact that NWA had a stronger case against IAM than it has against ALPA is no reason for refusing to require the parties to submit the issue to arbitration. It may mean that NWA will not prevail in this case as it did in the earlier one, but "An order to arbitrate should not be denied unless it can be said with assurance that the arbitration clause is not susceptible of an interpretation that

[1] The Court wishes to take this opportunity to commend Father Leo C. Brown, the neutral arbiter in the ALPA dispute, and Francis J. Robertson, the neutral in the IAM arbitration, for their expeditious handling of the respective arbitration proceedings.

covers the dispute. Doubt should be resolved in favor of coverage." See, *U. S. Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 564, 582-583 (1960); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957).

We are reluctant to further discuss whether or not ALPA has implicitly agreed to refrain from the conduct of the type it engaged in here. To do so might leave the arbiter with the impression that we have formed a view as to how the matter should be decided, and this we do not want to do. See, *Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, 106 (1962).

The trial court urges:

> "* * * If there is a no strike clause it will be by operation of the 'minor dispute' provision of the Railway Labor Act—a statutory provision enacted by Congress. Interpretation of Federal statutes is reserved to the Federal Courts and Administrative Agencies. It is not an appropriate function of a labor arbitrator. * * *"

Northwest Airlines, Inc. v. *The Air Line Pilots Association*, No. 4-70-Civ. 424, — F.Supp. — (D.Minn., Dec. 22, 1970).

We agree that the interpretation of federal statutes is reserved to the federal courts and administrative agencies, see, *Shore Line R. Co.* v. *Transportation Union*, 396 U.S. 142, 158 (1969), and is not an appropriate function of a System Adjustment Board. But we have not asked the Board to undertake an improper function here. In our

view, a union can expressly or implicitly agree to a clause that will prohibit it from instructing its members to respect a sister union's lawful picket line. We believe it can ge argued that ALPA has done so here. Thus we hold only that there is sufficient evidence in this record to require the question of whether there is such an implied agreement to be submitted to the System Adjustment Board.

We recognize that NWA takes the position that even if there is no express or implied agreement to refrain from the conduct complained of, that the Railway Labor Act itself prohibits it. ALPA vigorously disagrees and the trial court shares ALPA's views. NWA asks us to resolve this issue on this appeal. This question is clearly outside the province of the System Adjustment Board, but we do not believe it is necessary for us to resolve the issue at this time.

ALPA's final argument is that the Norris-LaGuardia Act, 47 Stat. 70, as amended, 29 U.S.C. §101-115, prohibits us from requiring the parties to submit this dispute to the Board. *Brotherhood of R. T.* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957), holds to the contrary.

We affirm our earlier decision and direct the parties to proceed with and complete the proceeding before the System Adjustment Board. We dissolve our injunction insofar as it imposes additional obligations on ALPA.

APPENDIX B

Opinion of the United States Court of Appeals for the Eighth Circuit, decided December 3, 1970

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 20,677.

NORTHWEST AIRLINES, INC.,

Appellant,

—v.—

THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[December 3, 1970.]

Before:

VAN OOSTERHOUT, HEANEY and BRIGHT,

Circuit Judges.

PER CURIAM.

We are asked to enjoin the Air Line Pilots Association, International, its members, officers and agents from authorizing or taking part in a concerted refusal to cross picket lines established by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees pending a determination of an

appeal from an order of the United States District Court for the District of Minnesota denying appellant's motion for a preliminary injunction.

NWA and ALPA are parties to a collective bargaining agreement which does not expire until June 30, 1971. The agreement is silent as to right of ALPA to ask its members to respect a sister union's picket lines. The agreement does not have a no-strike clause, but it does provide detailed machinery for the resolution of disputes involving interpretation and application of the agreement.

On July 8, 1970, NWA employees represented by BRAC went on strike and began picketing NWA facilities. The pilots continued to bid and fly available schedules on NWA's system.

On October 8, 1970, ALPA notified NWA that effective October 13, 1970, its members would refuse to cross the BRAC picket lines. This notice was withdrawn on October 12, 1970.

On November 24, 1970, a similar notice was sent by ALPA to NWA. This notice read:

> "THIS IS TO ADVISE THAT BEGINNING 0501CST NOV 27 1970 ALL NORTH WEST ORIENT AIRLINES PILOTS [WHO (sic)] ARE REPRESENTED BY THE AIRLINES PILOTS ASSOCIATION INTERNATIONAL WILL REFUSE TO CROSS BRAC PICKET LINES AND WILL NOT OPERATE NORTH WEST ORIENT AIRCRAFT DURING THE CURRENT LABOR DISPUTE ASSOCIATION REPRESENTATIVE AVAILABLE

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TO MAKE APPROPRIATE ARRANGEMENTS FOR THE ORDERLY SHUT DOWN OF OPERATIONS AIRCRAFT SECURITY AND RETURN HOME TO ALL CREWS AND AIRCRAFT."

Immediately after it received each of the notices that ALPA members would respect the BRAC picket lines, NWA invoked the jurisdiction of the System Board of Adjustment, as established by the parties pursuant to the National Railway Labor Act. The NWA submission stated that a dispute existed between NWA and ALPA arising out of the interpretation and application of the terms of the collective bargaining agreements entered into by the parties.

It stated that the questions and issues were as follows:

"1. Does the System Board of Adjustment (Board) have jurisdiction to determine whether the air line pilots, ALPA and its officers and agents have taken part or engaged in, or threatened to take part or engage in, a strike or concerted refusal to work for NWA, contrary to the provisions of the aforementioned agreements and the Railway Labor Act as incorporated therein?

2. If Question 1 is answered affirmatively, have the air line pilots, ALPA and its officers and agents taken part or engaged in, or threatened to take part or engage in, a strike or concerted refusal to work for NWA, contrary to the provisions of the aforementioned agreements and the Railway Labor Act as incorporated therein?

3. If Question 2 is answered affirmatively, what is the appropriate remedy?"

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ALPA made no formal response to the submission.

After each submission, NWA asked the United States District Court for the District of Minnesota to enjoin ALPA, its members, officers and agents, from authorizing or taking part in a concerted refusal to cross the picket lines established by BRAC.

On November 26, 1970, the district court issued a temporary restraining order; stating that the order was to be effective until December 2, 1970, and further stating that it would hold a hearing on NWA's motion for a preliminary injunction on that date.

On December 2, 1970, the court dissolved the temporary restraining order and denied NWA's motion for a preliminary injunction. The court concluded:

> "The [plaintiff] has not shown substantial probability of success on the merits. Plaintiff may have shown irreparable injury, though this cannot now be measured in the absence of information as to mutual aid assistance. The granting of the preliminary injunction will substantially impair the interests of the defendant in that for a much longer time will a substantial number of the pilots be unemployed. The public interest has already been affected by limited operations and will be affected unfavorably by a complete shutdown. The public interest will, however, be affected favorably if complete airline service is resumed as soon as possible."

This court must now decide whether it will grant the injunctive relief sought by NWA.

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We recently considered a similar problem in *Northwest Airlines, Inc.* v. *International Association of Machinists and Aerospace Workers, AFL-CIO, et al,* No. 20,662. We there required the parties to submit the basic issue "whether IAM, in the light of the no-strike provisions of the bargaining agreement retains the right to instruct its members to honor the picket lines of a sister union", to arbitration under the System Board of Adjustment.

This case is similar to the *IAM* case with two exceptions.

1. In *IAM, NWA* did not take steps to submit the basic dispute to the System Board of Adjustment until some two and one-half months after IAM employees began to honor BRAC picket lines.

2. The contract between NWA and IAM contained an explicit no-strike provision.

In our view, the second distinction may be of some importance in resolving the basic issue. Yet, we feel that NWA is correct in arguing that the ALPA contract can arguably be interpreted to prohibit the Association from instructing its members to respect the BRAC picket lines. The dispute is, thus, in our view, a minor one which must be submitted to the System Board of Adjustment. *See United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 564, 582-83 (1960). There, the Court, in a non-railway Act case, stated:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with

> positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

We feel the same standard is applicable here. In expressing this view, we refrain from stating any opinion as to the correct interpretation of the collective bargaining agreement.

We, therefore, hold that this basic issue and others collateral to it should be submitted by the parties to the System Board of Adjustment without delay. Specifically, we require (1) that representatives of NWA and ALPA meet no later than 11:00 a.m., Friday, December 4, 1970, for the purpose of selecting a neutral member of the Adjustment Board. This neutral should be one who can and will hear the basic dispute without delay; (2) if agreement is not reached by 3:00 p.m., Friday, December 4, 1970, as to the neutral, that the parties forthwith request the National Mediation Board to appoint a neutral. We suggest that the neutral appointed to settle the dispute between IAM and NWA would be an appropriate appointment; (3) that both parties request the neutral to hear the matter immediately after he has completed the hearing on the IAM-NWA dispute. This court sees no reason why a decision on the basic issue in this dispute cannot be handed down on or before Tuesday, December 15, 1970, recognizing that some of the collateral issues will take a longer time to resolve; (4) that a copy of the System Board of Adjustment's decision on the basic issue be filed

with this court immediately after it is handed down by the moving party.

We recognize the problems involved in suggesting the parties submit this dispute to the neutral arbitrator appointed to hear another dispute. However, in our view, the public interest in quick resolution of the earlier dispute between NWA and the union with which it deals is so great that we must use all possible means toward a peaceful and speedy end to the problems.

We preserve the status quo by requiring ALPA to immediately withdraw its notice of November 24, 1970, or any subsequent notices of similar import, to promptly inform its officers, members and agents that it has withdrawn said notices; to inform said parties that they are free to continue to work on request of the company; and to inform them that ALPA will take no disciplinary action against pilots continuing to work on the request of the company. ALPA shall use all means at its command to communicate the contents of this order to its officers, members and agents.

We retain jurisdiction for the purpose of granting such relief as may be necessary, either on our own motion or the motion of the parties. We also reserve the right to file a further opinion expressing our reasons for issuing this order.

Let this opinion and order be served forthwith upon the above-named defendant by handing to and leaving with it one true and correct copy thereof. Service to be made as in the case of service of a Summons and Complaint in accordance with the Rules of Civil Procedure.

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BRIGHT, Circuit Judge, concurring.

I concur in the court's opinion to the extent that it effectively enjoins the Air Line Pilots Association (ALPA) from instructing its members not to cross the picket lines established by BRAC. I believe that NWA has presented adequate grounds on this motion to justify the issuance of a temporary injunction pending appeal in the exercise of this court's equitable discretion. F.R.A.P. 8(a), 28 U.S.C. *Eastern Greyhound Lines* v. *Fusco*, 310 F.2d 632 (6th Cir. 1962).

I am compelled to disagree with the action of the majority which for practical purposes determines the merits of the substantive issue in this case: whether or not ALPA's claimed right as a union to instruct its members to refuse to cross BRAC picket lines is a matter the union must submit to the System Board of Adjustment for compulsory arbitration. This difficult legal issue merits intensive study and thorough consideration, *see Brotherhood of Locomotive Firemen & Enginemen* v. *Florida East Coast Ry.*, 346 F.2d 673 (5th Cir. 1965); *Chicago & Illinois Midland Ry.* v. *Brotherhood of Railroad Trainmen*, 315 F.2d 771 (7th Cir. 1963); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 190 F.Supp. 495 (W.D. Wash. 1961), and should not be resolved upon a motion for a temporary injunction. At any rate, NWA's presentation before us indicated some probability of success based upon *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.*, 353 U.S. 30 (1957), and its progeny. The facts presented to us provide a persuasive basis to protect the

parties, their members and employees, and the public from sustaining irreparable harm pending final decision on appeal. That appeal is not yet before us.

While I concur in the direction of the majority's opinion, I feel that its method takes us too far at this time.

APPENDIX C

Opinion of the United States District Court for the District of Minnesota, decided December 22, 1970

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

No. 4-70-Civ. 424

NORTHWEST AIRLINES, INC.,

Plaintiff,

vs.

THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendant.

MEMORANDUM

On July 8, 1970, the clerical and other employees (hereafter BRAC) of Northwest Airlines (hereafter NWA) went on strike after exhausting all mandatory procedures required by the Railway Labor Act.

This is the third lawsuit in this Court arising out of that strike. In August BRAC sued NWA in the District of Columbia. In that action, which was transferred to Minnesota, BRAC asked for an injunction temporarily enjoining NWA from three claimed violations of the Railway Labor Act. This Court found NWA to be in violation in one respect and denied the other two requests.

Appendix C—Opinion of the United States District Court for the District of Minnesota, decided December 22, 1970

The second lawsuit was brought by NWA against the machinists union (hereafter IAM). In the case of the machinists, on July 8, the day of the strike, NWA notified the 3,500 employees of IAM that they were laid off. Apparently before July 8 IAM had notified BRAC that it would honor BRAC's picket lines. On July 18 NWA notified 763 IAM employees to return to work on a seniority basis. About 100 reported to the NWA main base here and about 121 reported for work elsewhere in the system. In their agreement with NWA the machinists have a no strike clause.

In late September NWA sued IAM to enjoin it from interfering with NWA operations and from violations of the Railway Labor Act. The motion for a preliminary injunction was denied. On appeal, the Court of Appeals for this Circuit stated that the basic issue was whether the IAM because of the no strike provisions of its bargaining agreement retained the right to instruct its members to honor the picket lines of a sister union. The Court, after characterization as a "minor dispute," referred this issue to the Systems Adjustment Board and asked for a decision by December 11. It did not, however, compel IAM members to return to work.

The instant case originally arose on October 8, 1970, when the Pilots Association (hereafter ALPA) notified NWA that effective October 13 at 0501 CST NWA pilots would honor the BRAC picket line. There is not an explicit no strike clause in the ALPA-NWA collective bargaining agreement. On October 12 a hearing was to be held on NWA's request for a temporary restraining order. How-

ever, on the intervention of the Secretary of Labor, negotiations between BRAC and NWA were resumed and the pilots agreed to withhold their proposed action. After ALPA withdrew its notice to honor BRAC picket lines on October 13, there were no more proceedings in this Court until November 25.

On November 24 ALPA again notified NWA that it would honor BRAC picket lines, effective November 27 at 0501 CST. On November 25 NWA renewed its request for a temporary restraining order directing ALPA to cancel the November 24 notice. A hearing was held late on Wednesday, November 25, and after a quick review on Thursday morning of the applicable statutes and some Court decisions, a temporary restraining order was issued requiring a cancellation of the notice. The public interest in part required continuation of the flights over the Thanksgiving holiday weekend and also the Court felt that it would need additional time at a hearing on the request for a preliminary injunction to explore the matter further. ALPA complied and continued flying.

The request by NWA for a preliminary injunction and the motion of the pilots to dissolve the temporary restraining order were consolidated for hearing and heard on December 2, 1970.

NWA has requested a preliminary injunction, generally asking that ALPA, its members, officers, etc., be enjoined from refusing to cross picket lines established by BRAC. It maintains that the duty to arbitrate contained in the "minor dispute" provisions implies, as a matter of law, a

no strike clause in the collective bargaining agreement. NWA argues that the refusal to cross picket lines is a violation of the implied no strike clause which constitutes a "minor dispute" under the Railway Labor Act and hence must be submitted to the System Board of Adjustment pursuant to the compulsory arbitration of "minor disputes" provided by the Act. In addition, NWA alleges that Section 2 (First) of the Railway Labor Act creates an affirmative duty on the part of employees not to create an interruption in the operations of a carrier.

In determining whether the extraordinary relief requested by NWA should be granted, consideration must be given to four essential factors.

1. Has the plaintiff shown substantial probability of success on the merits?

2. Has the plaintiff shown irreparable injury?

3. Will the granting of a preliminary injunction substantially impair the interests of the other party to the proceedings?

4. How will the granting of an injunction affect the public interest?

In addition, there is the issue of whether or not the Norris-LaGuardia Act operates to deny this Court the jurisdiction to grant an injunction under these circumstances.

The Railway Labor Act is a scheme devised by Congress whereby disputes between common carriers under the Act and their employees can be resolved. If the disagreement

is over wages, rules or working conditions, an elaborate procedure of negotiation and mediation is set up. If the dispute involves a grievance or a disagreement arising out of the interpretation or application of the collective bargaining agreement, resolution is achieved ultimately by an arbitral decision binding on both parties. The purpose of these provisions is to completely preclude a union from initiating a strike over grievances and disputes arising out of contract interpretation ("minor disputes") and in those situations where the dispute is over wages, hours and working conditions ("major disputes"), to require utilization of almost every conceivable method by which mutual agreement can be reached, before resorting to self-help.

The "Minor Dispute" provision of the Railway Labor Act manifestly presumes the existence of some underlying disagreement which has to be resolved and sets forth procedures for doing so without resort to a strike.

The situation before this Court, however, does not present an underlying dispute between ALPA and NWA over which ALPA in an attempt to achieve a favorable resolution has initiated a work stoppage. The situation presented involves the work stoppage itself as the very basis of the disagreement.

The Supreme Court of the United States has made it clear that a no strike clause will be implied where there is an obligation to arbitrate. *Boys Market, Inc.* v. *Retail Clerks*, 90 S.Ct. 1583 (1970); *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). NWA argues that such a duty exists as to all collective bargaining agreements subject to the Railway

Labor Act by reason of the "minor dispute" provisions of the Act. It must be remembered, however, that the duty to arbitrate under the Railway Labor Act follows the dispute. There is no duty to arbitrate until and unless there is a "minor dispute." As a result, there can be no implied no strike clause until there is a "minor dispute." In the instant case it is the work stoppage itself which NWA claims constitutes the "minor dispute." There is, therefore, no duty to arbitrate, from which a no strike clause can be implied, until the work stoppage is commenced creating the "minor dispute." Hence the no strike clause and its violation arise out of the same act.

The circularity of the situation is not alleviated by characterizing the dispute as one over the right of NWA to order ALPA members to cross the picket lines. The whole basis of such an order is the existence of a no strike clause. Again, the only manner by which a no strike clause can be implied is through the "minor dispute" provision of the Railway Labor Act. There is, however, no "minor dispute" until such time as ALPA members refuse to comply with NWA's order and proceed to honor the picket line. Once again, the obligation to obey and the refusal to do so arise out of the same act.

The above situations can be contrasted with the one surrounding the IAM refusal to cross BRAC picket lines. The IAM-NWA collective bargaining agreement contains an express no strike clause. The IAM decision to honor BRAC picket lines clearly raises a colorable conflict with the provisions of the agreement. Although, as in the instant case,

the work stoppage itself created the dispute, the corresponding duty not to engage in the stoppage pre-existed the violation.

The conceptual problem created by the circular situation presented in the instant case is complicated by the fact that the work stoppage is a strike only in a generic sense. ALPA is not involved in initiating a work stoppage in an attempt to compel a concession from NWA in a dispute ALPA has with NWA. Rather, ALPA is refusing to cross picket lines established as the result of an already existing strike, being legally conducted by other employees of NWA. Thus, although the form is the same, the substance is not. ALPA's action is supportive, not initiatory. The thrust of the Railway Labor Act, particularly the "minor dispute" provisions, is toward limiting the circumstances under which initiatory strike action can be taken by employees. This would be natural since supportive stoppages of the type involved in this action would be dependent upon the existence of picket lines arising out of an initiatory strike. It seems unlikely to this Court that Congress intended the "minor dispute" provision to operate as a no strike clause which prohibits a union from honoring picket lines established as a result of a legal strike under the Act. To do so would ascribe to Congress an intent not only to delay the ultimate use of the strike as an economic weapon but also to limit its effectiveness when eventually resorted to. The latter is to this Court an untenable position. This will be examined in more detail later in this memorandum.

Appendix C—Opinion of the United States District Court for the District of Minnesota, decided December 22, 1970

To treat the situation before this Court as a "minor dispute" creates legal as well as conceptual problems. There is no express contract provision to be interpreted. If there is a no strike clause it will be by operation of the "minor dispute" provision of the Railway Labor Act—a statutory provision enacted by Congress. Interpretation of Federal statutes is reserved to the Federal Courts and Administrative Agencies. It is not an appropriate function of a labor arbitrator. Furthermore, the circular nature of NWA's argument creates the same conceptual problem alluded to above in a different context. In order to have an implied no strike clause to interpret, there must be a "minor dispute" to create a duty to compulsorily arbitrate. However, once the determination is made that the strike constitutes a "minor dispute" there is nothing left to arbitrate. As a "minor dispute," the strike must be enjoined. When the strike is enjoined the basis of the "minor dispute" disappears. There is no obligation to arbitrate under the Railway Labor Act unless there is a "minor dispute." Therefore with the disappearance of the "minor dispute," the duty to arbitrate is extinguished. Since the no strike clause is implied from the duty to arbitrate, the no strike clause also dematerializes. The arbitrator has nothing left to interpret.

It could be argued that this creates a situation to be governed by *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574. There the collective bargaining agreement contained a no strike, no lockout provision and had a grievance procedure providing for compulsory arbitration of differences arising between the company and union

as to the meaning and application of the contract provisions. Matters which were "strictly a function of mangement" were specifically excluded from arbitration. The employer was contracting out work previously performed by employees while a number of employees were laid off ostensibly due to lack of work. The union sought to arbitrate the grievance but the employer refused, maintaining that the decision to contract work was strictly a function of management and hence nonarbitrable. Both courts below held for the employer. The Supreme Court reversed, holding that judicial inquiry must be strictly confined to whether the reluctant party agreed to arbitrate the grievance. The decision as to whether contracting out violated the contract was to be left to the arbitrator. This was necessary because with a no strike clause in the contract and the managerial function exception to the arbitration clause, it would be natural for the employer to characterize every single decision adversely affecting the employees as a "management function" and non-arbitrable. If the courts were to get involved in determining in every case whether the particular grievance fell within the exception or not, the arbitration clause, as the Court put it, "would be swallowed up by the exception." 363 U.S. at 584. Every issue would at least preliminarily be in court and the arbitration procedure would not be utilized.

Although at first blush it appears that *Warrior* might be applicable to the present situation, a closer examination demonstrates to this Court that it clearly is not. In *Warrior* the determination was to be made by the arbitrator

whether or not contracting out came within the arbitration clause or the exception. Both provisions were contained within the four corners of the contract. The arbitration clause covered "the meaning and application of the provisions of this Agreement." The Court simply determined, in light of this, that any dispute over what constituted a managerial function was one involving "the meaning and application" of a provision contained within the collective bargaining agreement. The Court left to the arbitrator the threshold decision as to whether or not the dispute came within the jurisdiction of the arbitration clause or whether it was excluded pursuant to *another contract provision.* In the case before this Court we have a vastly different situation.

The duty to arbitrate is not explicit but is in the contract by implication, being derived from the language of the Railway Labor Act. Under the Railway Labor Act the duty to arbitrate with its attendant implied no strike clause follows the dispute. In other words, there first has to be a minor dispute; then there arises a duty to arbitrate. This creates a series of problems.

First of all, there is the conceptual problem once again. Since the implied no strike clause arises only upon a determination of a minor dispute, there is no no strike clause within the agreement for the arbitrator to interpret unless first of all there is a determination that the strike constitues a "minor dispute." If that determination is made, then there is nothing left to interpret since the strike must then be enjoined with the results described previously. In *Warrior*, the arbitration clause, the jurisdiction of which

was in question, was in the agreement itself. Here it is not. More importantly, the determination critical to the existence and operation of the clause—namely, that there is a minor dispute—extinguishes not only the jurisdictional issue, but the entire dispute.

Secondly, since the clause to be interpreted does not arise out of the agreement between the parties but out of the operation of Federal labor legislation, it is not a question of intent of the parties but of the intent of Congress. This is clearly a question for the Courts and not for the arbitrator. Putting aside the question of the institutional appropriateness of the arbitrator, there is the practical consideration of consistency. It is entirely possible, if the *Warrior* approach were followed, that different arbitral bodies would differently decide the question of whether a refusal to cross picket lines in the absence of an *express* no strike clause is prohibited by an *implied* no strike clause arising out of the "minor dispute" provision of the Railway Labor Act.[1] This may not be of any importance, however, because this Court's reading of *Warrior* indicates to it that judicial inquiry is to be made as to whether there was intent to submit to arbitration. In the instant case the

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[1] *Cf. Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

The determination of the permissible range of self help "cannot be left to the laws of the many States, for it would be fatal to the goals of the Act" if conduct were prohibited by state laws "even though in furtherance of the federal scheme. *The needs of the subject matter manifestly call for uniformity.*" (Emphasis supplied.) 394 U.S. at 381, citing in part from *Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 691-92 (1963)

equivalent issue to be decided by the Court is the intent of Congress as to the characterization of a refusal to cross picket lines as a "minor dispute." This follows from the fact that the only basis for an obligation to arbitrate under the Railway Labor Act arises out of a "minor dispute." Hence, there must be a "minor dispute" in order to have an arbitration clause for the arbitrator to determine the jurisdiction of. However, a determination of that question in the affirmative by the Court eliminates the necessity of a jurisdictional inquiry by the arbitrator because a "minor dispute" is by definition one which must be arbitrated.

This is not to say, however, that *Warrior* does not have any efficacy insofar as the Railway Labor Act is concerned. A clause exempting management functions from dispute by the union could create a situation exactly parallel to *Warrior*. The union could maintain that some administrative action by the employer violated a provision of the contract—for instance, the right to bid jobs by seniority. If the employer maintained that the action came within purview of the exclusion clause, it would be consistent with the Railway Labor Act and *Warrior* for the Court to refer the dispute to a System Board of Adjustment which would initially determine whether the dispute was arbitrable. If the Board decided that the dispute was not a "major" but a "minor" dispute, but that it still was not arbitrable because it came within the exclusion, a strike by the union over the dispute would be clearly enjoinable by the courts. It is apparent from the foregoing that this Court feels it is the Court that should determine whether or not Congress intended a refusal to cross picket lines to be characterized

as a "minor dispute" arising out of an implied no strike clause. This Court is inclined to believe that Congress had no such intent. This inclination is not derived solely from the circularity of the arguments made to the contrary, but results largely from an examination of the Railway Labor Act and recent Supreme Court decisions.

Although Congress clearly intended, when it enacted the Railway Labor Act, to delay utilization of the strike as a means of obtaining economic gains, there is no indication that there was any intent to diminish its effectiveness once resorted to. An examination of the structure of the Act demonstrates that diminishing the effectiveness of the strike would be at cross purposes with the "major dispute" bargaining provisions in the Act. Congress could have substituted arbitration for the negotiation-mediation provisions set forth for "major disputes" just as it did for "minor disputes." Congress chose not to. There is no explicit limitation on the conduct of a strike once negotiations and mediation pursuant to the Act have failed to resolve the issues. As a practical matter it is the existence of the right to ultimately conduct an effective strike which creates employee bargaining power during the negotiation-mediation process. It is only the awareness that he may be the object of an effective economic strike if resolution of issues is not achieved by mutual agreement that compels an employer to bargain seriously with the union. Furthermore, it is highly unlikely that Congress would abrogate the union's right to strike without providing an alternative method to compel resolution of issues. Within the Railway Labor Act itself there is evidence that this is true. The 1926 Act contained

the distinction between "major" and "minor" disputes. However, it did not provide for compulsory arbitration of the latter. Congress in 1934 because of threatened disruptions in carrier service caused by "minor disputes" withdrew the right to strike in that context. However, it substituted, for the right to exercise economic coercion, the decision making process of a neutral body binding on both parties to the dispute.

The possibility is remote at best that Congress intended the "minor dispute" provisions to be interpreted in a manner that would substantially reduce the effectiveness of a legal strike over a "major dispute" without providing an alternative method for final settlement of the dispute. An employer being aware of the inability of the union to mount an effective strike without the support of sister unions might be tempted to wait for the strike and break the union. *Cf. Railway Clerks* v. *Florida E. C. Ry.*, 384 U.S. 238, 245 (1965) (hereinafter *F.E.C.*).

The Supreme Court's approach has clearly been to interpret the Act in order to allow free play of economic power once self-help is reached. This has been carried to the extent of holding inapplicable sections of the Railway Labor Act which if enforced once the point of a strike had been reached would have seriously impaired the carrier's right to engage in self-help. *F.E.C., supra.* In another case the Court permitted picketing by the striking union which arguably would have been proscribed under the NLRA as secondary in nature because Congress did not clearly indicate that secondary picketing was illegal under the Railway

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Labor Act. *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969) (hereinafter *Jacksonville*).

In the *F.E.C.* case the nonoperating unions made a demand for a general wage increase and notice requirements in the event of layoffs or job abolitions. The claim was processed through the mandatory procedures of the Railway Labor Act. When F.E.C. refused to accept a compromise settlement proposed by a Presidential Emergency Board, the nonoperating unions struck. The operating unions refused to cross the picket lines. It should be noted in this regard that the Supreme Court did not express any concern that the action of the operating unions in honoring the nonoperating union's picket lines resulted in the creation of a "minor dispute" or otherwise violated any duty imposed by the Railway Labor Act.

After a short shutdown F.E.C. resumed operations, using supervisory personnel and replacements to fill the jobs vacated by the strikers and those operating employees who refused to cross picket lines. Individual agreements were made with these workers, the terms of which differed substantially from those contained in the collective bargaining agreements with the various unions. Thereafter F.E.C. proposed to abolish all the existing agreements and substitute a new one which would result in substantial departures from the terms of the old ones. After a series of abortive negotiations and an attempt at mediation, F.E.C. unilaterally established yet another agreement and proceeded to operate under it until 1964.

It was then that the Government brought suit against F.E.C. charging that the unilateral changes by F.E.C. in the bargaining agreements was a violation of Section 2 (Seventh) of the Railway Labor Act, which provides:

> "No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Section 6 of the Act initiates the mandatory negotiation-mediation machinery for "major disputes." The Supreme Court ruled that F.E.C. when the point of self-help was reached could not be bound by Section 2 (Seventh) of the Railway Labor Act. In regard to that section the Court said:

> "It is, . . . argued . . . that each of these issues [The unilateral changes by F.E.C. in the terms of the collective bargaining agreements] must run the same gantlet of negotiation and mediation, as did the pay and notice provisions that gave rise to this strike. The practical effect of that conclusion would be to bring the railroad operations to a grinding halt. . . . If, therefore, § 2 Seventh is applicable after a lawful strike has been called and after lawful self-help has been invoked by the carrier, *the right of self-help might well become unilateral to the workers alone, and denied the carrier.*" (Emphasis supplied.) 384 U.S. at 245-46.

The argument has equal force in the instant case, especially when one considers the fact the "minor dispute" provisions

sought to be invoked result in serious conceptual problems and require the questionable practice of permitting an arbitral body to interpret Congressional legislation if applied in the manner NWA proposes.

The *Jacksonville Terminal Case* arose out of the same labor dispute as the *F.E.C. Case*. After F.E.C. unilaterally changed the terms of the collective bargaining agreements, picketing commenced at locations where F.E.C. carried on operations. This included the terminal company which was utilized by other railroads also. A Federal District Court enjoined the picketing of the terminal except at a special gate set aside for F.E.C. employees. The Court of Appeals for the Fifth Circuit reversed, holding that the Norris-LaGuardia Act barred issuance of a Federal injunction. *Railroad Trainmen* v. *Atlantic C.L. R.R. Co.*, 362 F.2d 649 (5th Cir. 1966). This was done even though the employees honoring the picket lines were not employees of F.E.C., the struck employer, but of other railroads who also used the facilities of the terminal. An equally divided Supreme Court affirmed *Railroad Trainmen* v. *Atlantic C.L. R.R. Co.*, 385 U.S. 20 (1966).

While the above litigation was pending in the Federal courts, the terminal company obtained injunctive relief from a Florida State court. It was this injunction which eventually culminated in the *Jacksonville* decision.

The State trial court found that general picketing would result in virtually a complete shutdown of the terminal company's activities, would cause serious economic damage to the State, and that it constituted an illegal secondary

boycott and was proscribed under various other State laws. The Supreme Court of the United States, speaking through Mr. Justice Harlan, reversed, holding that although the Florida courts may have had jurisdiction over the litigation, the application of State law was limited by the nationwide Congressional policy contained in the Railway Labor Act's scheme for resolving major disputes. Since peaceful primary picketing incident to a lawful strike is protected activity under the National Labor Relations Act and there is no basis for distinguishing picketing under the Railway Labor Act, it is protected activity under the Railway Labor Act. The Court went on to say in discussing the secondary nature of the picketing:

> "[W]e have been furnished by Congress neither usable standards nor access to administrative expertise in a situation where both are required. In these circumstances there is no really satisfactory judicial solution to the problem at hand. *However, we conclude that the least unsatisfactory one is to allow parties* who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ *the full range of whatever peaceful economic power they can muster,* so long as its use conflicts with no other obligation imposed by federal law." (Emphasis supplied.) 394 U.S. at 392.

NWA obviously contends that ALPA's refusal to cross picket lines is in violation of an implied no strike clause arising out of the "minor dispute" provisions of the Railway Labor Act and hence within the scope of the exclusion contained at the end of the portion of the opinion cited

above. This notion is quickly dispelled by examining the Court's discussion earlier at page 389 of the opinion, where, it said:

> "In *Electrical Workers* v. *NLRB* [366 U.S. 667], for example, we noted that striking employees could picket at a gate on the struck employer's premises which was reserved exclusively for employees of the secondary employer, *to induce those employees to refuse to perform work for their employer* which was connected with the struck employer's normal business operations."

Here there was clear acknowledgment of the right to appeal to secondary employees to withhold services connected with the struck employer's operations. There can be no argument as to the right to make that appeal to primary employees at the primary situs of the struck employer, which is the situation in the instant case. Although the Court was discussing the holding in a case decided under the NLRA, it ultimately held in *Jacksonville* that a similar secondary appeal could not be enjoined under the Railway Labor Act. If an appeal for support to secondary employees can legitimately be made under the Railway Labor Act, certainly there cannot be a serious assertion made that an appeal to employees of the primary employer would be proscribed. The right to make that appeal must obviously carry with it the corresponding right of the non-striking employee to respond. It is unreasonable to attribute to the Supreme Court the contrary position. The Court would hardly recognize the right of the striking employees to make

such an appeal if the response thereto by the non-striking employees was prohibited by the Railway Labor Act.

It has been represented to this Court that NWA's construction of the Railway Labor Act will simply delay—not permanently eliminate—the right to honor a sister union's picket line. This contention ignores the conceptual and legal problems discussed above attendant to treating a refusal to cross picket lines as a "minor dispute." However, putting those considerations aside, it was precisely this argument that the Supreme Court rejected in the *F.E.C.* case. Had the Supreme Court held Section 2 (Seventh) applicable it would not have permanently foreclosed F.E.C. from making the changes it sought to make; it would simply have delayed their implementation until the mandatory procedures of the Act were complied with. The Supreme Court recognized that the mere delay may create such an imbalance in economic power as to make the right to self-help completely one-sided.

The Supreme Court decided in *F.E.C.* not to apply Section 2 (Seventh) because to do so would interfere with the employer's right to self-help. This was done even though the provision was plainly applicable on its face and it could have been enforced without creation of the conceptual problems associated with the instant case. The Court recognized in *Jacksonville* the right to appeal to secondary employees to honor picket lines along with the corresponding right of the secondary employees to respond to that appeal. These decisions mandate against any construction of the Railway Labor Act's "minor dispute" provision which

would destroy or limit the right of primary employees to respond to a picket line established pursuant to a legal strike. A decision to the contrary would diminish the effectiveness of the striking union's self-help efforts and severely affect the bargaining power of those unions who need it most—the ones made up of unskilled and semi-skilled workers. The practical effect would be to discriminate in favor of that class of unions which has the capacity by virtue of possessing critical skills to close down an employer without the support of other employees.

NWA's second argument is based on Section 2 (First) of the Railway Labor Act.

> "*It shall be the duty of all carriers, their officers, agents and employees* to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and *to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.*" (Emphasis supplied.)

NWA maintains that this provision of the Act imposes an affirmative duty on the parties to resolve all labor disputes regardless of their origin without interruption to the operations of the carrier involved.

This position comes perilously close to making it illegal as a matter of law for employees under the Railway Labor Act to conduct an effective strike. If the honoring of picket

fines will effectively shut down the carrier, the position of NWA is that such an action must be enjoined as a violation of a positive duty imposed by Section 2 (First) of the Act. However, this reasoning seems equally applicable if the pilots rather than BRAC were involved in the underlying "major dispute." Would NWA then maintain that ALPA has an obligation to conduct an ineffective strike, that the pilots could not completely withhold their services because to do so would involve an interruption of carrier service? It is impossible for this Court to assume such a posture in light of the prior discussion concerning the Act and its interpretation by the Supreme Court.

An exception carved out for the union that has the "major dispute" with the employer would appear to this Court to be a senseless one. It would permit violation of a duty which NWA claims controls all other work stoppage fact situations, including the instant one, and would accomplish nothing except to discriminate in favor of those unions which have the capacity to shut down an employer without the aid of sister unions. There is no sound policy reason to create disparate bargaining power, as a matter of law, between different classes of employees under the Act.

NWA's interpretation of the operative effect of Section 2 (First) is totally inconsistent with the *Jacksonville* case. The Supreme Court accepted the findings of the Florida trial court that the picketing of the terminal would cause a cessation of terminal business and cause serious economic damage to the State. Despite the fact that the picket lines appealed to secondary employees, the Court said of the right of the employees to conduct the strike:

> "Whether the source of this right be found in a particular provision of the Railway Labor Act or in the scheme as a whole, it is integral to the Act. *State Courts may not enjoin a peaceful strike by covered railway employees, no matter how economically harmful the consequences may be.*" 394 at 384-85 (Emphasis supplied.)

Obviously this applies equally to the Federal courts. The Court went on:

> "The Court has consistently held peaceful primary picketing incident to a lawful strike to be protected conduct under the National Labor Relations Act. 'Picketing has traditionally been a major weapon to implement the goals of a strike' [citation omitted] and 'it is implicit in the Act [NLRA] that the public interest is served by freedom of labor to use the weapon of picketing.' [citation omitted]. *We see no possible grounds for distinguishing picketing under the Railway Labor Act. Peaceful primary strikes and picketing incident thereto lie within the core of protected self-help under the Railway Labor Act.*" 394 U.S. at 385-86. (Emphasis supplied.)

As previously pointed out, the right to make an appeal by picketing would hardly be protected by the Supreme Court if the response to that appeal (refusal to cross the picket lines) was prohibited.

The right to honor a picket line is not an immutable principle of law nor a clearly protected constitutional right. Congress has the power to take it away. However, in the Railway Labor Act, Congress incorporated the right to strike into a scheme of labor legislation and it is apparent

that the viability of the bargaining procedure in that scheme rests to a large extent on the knowledge of the parties that it will be an effective strike when ultimately resorted to. Under these circumstances the Courts should not place any limitation on peaceful conduct of strikes absent a clear and unequivocable indication by Congress that they should do so.

In this regard Section 10 of the Railway Labor Act provides that a special Presidential Emergency Board may be created by the President if in the judgment of the Mediation Board a dispute threatens "to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service." The National Mediation Board did not make that judgment in the instant case, and it is no argument to say that at the time the NWA-BRAC dispute reached the point of self-help the Board did not realize that ALPA would honor the picket lines. There was no reason to assume that they would not and on the basis of the *Jacksonville* decision there was nothing to make the Board think that ALPA could not do so. If Congress had intended Section 2 (First) to have the effect NWA seeks to attribute to it—a flat prohibition against shutting down a carrier or interrupting commerce —why is Section 10 in the Act? Does it provide the machinery for determining when there exists an interruption of commerce so as to make Section 2 (First) operative? That does not appear to be the case. Section 10 does not refer back to Section 2 (First) nor does it contain a provision for compulsory arbitration of the unresolved "major disputes."

Section 10, it should be noted, does not create a prohibition against strikes. It merely delays, for an additional sixty days, the resort by the parties to self-help. Although the President has the power to call the Emergency Board, he is not vested with the power to compel arbitration or prohibit a strike over major disputes. The latter two objectives can only be achieved by an act of Congress.

Section 10 provides the machinery for bringing to the attention of Congress and the executive branch those instances in which a strike might be particularly disruptive to interstate commerce. However, Congress reserved the ultimate power to respond to interruptions in interstate commerce to itself and the executive branch. It is inconsistent with that position for Congress to create in Section 2 (First) a flat prohibition against all strikes that interrupt commerce or the operations of a carrier without prior Congressional consideration.

This view of the role of Section 2 (First) is reinforced by the fact that Congress has taken *ad hoc* action in the past. It has enacted special legislation to settle railway disputes so as to avoid a strike. This was a peculiar action indeed if in the opinion of Congress a pre-existing prohibition against crippling strikes was embodied in Section 2 (First) of the Railway Labor Act.

Thus far this Court has determined that ALPA's refusal to cross the picket lines established by BRAC is not prohibited by any policy contained in Section 2 (First) of the Railway Act nor can it be enjoined by characterizing it as

a "minor dispute." This still leaves the questions of what is it and what approach can be utilized to determine the legality of the action.

NWA contends that if the strike is not a "major" or a "minor dispute" but some other kind of dispute and for that reason cannot be enjoined, the Court is opening the door to a strike for any reason or no reason at all, provided the strike is called over a dispute which is not referable to a System Board of Adjustment or is not called during the pendency of negotiations pursuant to a "major dispute" under the Act. This contention can be answered in several ways.

First of all, at least insofar as a strike for no discernable reason at all is concerned, the argument is *reductio ad absurdum*. It defies common sense to anticipate that a union will conduct a strike that seeks to achieve nothing at all.

Secondly, let us assume that a refusal to enjoin ALPA in this case created a possibility of the problems envisioned by NWA. Even if that were true, its proposed interpretations of the Railway Labor Act, both of which place a severe strain on the entire collective bargaining fabric contained in that enactment, are hardly the most appropriate solution to the problem.

Finally, the situation before this Court does not involve an initiatory strike by ALPA over "any issue" but is an expansion of an already existing strike over a "major dispute" being legitimately conducted by BRAC after exhausting all mandatory procedures required by the Railway

Labor Act in the event of a "major dispute." Hence the work stoppage proposed by ALPA is arguably part and parcel of the BRAC dispute and its legality is governed by the legality of the initiatory strike by BRAC. This brings us to the approach which to this Court appears to be the most sensible one when dealing with a refusal to cross picket lines.

Obviously, if there is a refusal to cross picket lines, there must be some picket lines to honor. It is the legitimacy of the strike underlying those picket lines that should be examined to determine whether or not honoring of the picket lines is permissible. In other words, if the underlying strike is a legal strike, pursuant to a "major dispute" any refusal to cross those picket lines should be treated as concerted activity arising out of that legal strike and hence unenjoinable under Section 4 of the Norris-LaGuardia Act. See *Northwest Airlines* v. *Transport Workers Union,* 191 F. Supp. 495 (W.D. Wash. 1961).

It is easy to identify a situation involving a refusal to cross picket lines. There is ordinarily no difficult subjective determination to be made as to whether the action constitutes a refusal to cross picket lines or constitutes some other kind of action. The underlying dispute out of which the picketing arose is also usually identifiable. Oftentimes, in fact, there may already have been a judicial determination as to the legality of the underlying strike. Obviously ALPA can bargain away its right to participate in this manner in a legitimate strike by a sister union by inserting an appropriate clause in the collective bargaining agreement just as

they could bargain away their ultimate right to strike over a "major dispute." When this is the case there is a colorable "minor dispute" over the contract provision and an injunction would be in order until a System Board of Adjustment determined the scope of that *specific* contract provision.

A brief discussion should be made as to the applicability of the Norris-LaGuardia Act in light of the conclusions of this Court. It has been determined that:

1. The refusal by ALPA to cross BRAC's legal picket lines is concerted activity arising ultimately out of the "major dispute" underlying the strike by BRAC.

2. Section 2 (First) of the Railway Labor Act cannot be interpreted to create a flat prohibition of any action which will interfere with carrier service.

3. The refusal by ALPA to cross BRAC picket lines, arising out of a legitimate strike over a "major dispute" does not create a "minor dispute" within purview of the Railway Labor Act absent a specific no strike clause in the ALPA collective bargaining agreement with NWA. To consider the refusal as such would greatly diminish the effectiveness of the legitimate strike, a result at cross purposes with the "major dispute" provisions of the Railway Labor Act and inconsistent with recent Supreme Court cases interpreting the Act.

There is no question that there must be an accommodation of Norris-LaGuardia and the Railway Labor Act. *Railroad Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30, 40 (1957).

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This Court's findings establish that ALPA's refusal to cross BRAC picket lines was not prohibited by any provision or provisions of the Railway Labor Act. Furthermore, it found that to enjoin such activity would interfere with the effectiveness of the procedure established by the Act to deal with "major disputes." Under such circumstances the Norris-LaGuardia Act removes the jurisdiction of this Court from enjoining ALPA from honoring BRAC picket lines.

Implicit in this ruling is the disposition of two of the four major factors ordinarily considered by a Court in granting equitable relief—probability of success on the merits and effect on the public interest.[2]

SUCCESS ON THE MERITS—

The plaintiff has not shown substantial probability of success on the merits. As a matter of fact, there is a high degree of probability that there is no merit to either of NWA's contentions.

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[2] The other two factors—existence of irreparable injury and whether there is any substantial impairment of the interests of the other party—are not of particular importance. Both are invariably present in any situation where a request is made to enjoin a strike and generally cancel each other out. In the instant case the granting of an injunction will undoubtedly impair the interests of ALPA and its members, particularly those member pilots who have not worked for several months as a result of the strike. Conversely, it is very likely NWA would suffer some irreparable damage if the injunction were not granted, although it is a little more difficult to evaluate in this case since there is no indication as to how much NWA is receiving in mutual aid payments from other air carriers.

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EFFECT ON PUBLIC INTEREST—

Obviously, if ALPA's refusal to cross the picket lines results in a complete shutdown of NWA's operations it will create a severe inconvenience to the public. However, the short-term convenience of the public should not be confused with its interest. The latter manifests itself in many ways. Included are the benefits which flow from maintaining the integrity of the collective bargaining provisions of the Railway Labor Act or, for that matter, in the adherence by the Courts to the congressional policy contained in the Norris-LaGuardia Act which reflects a desire to have the Courts refrain from interfering with the conduct of strikes except under certain specified conditions. The existence of the Emergency Board provision in Section 10 of the Railway Labor Act, coupled with the fact that whenever it has appeared necessary to do so in the public interest Congress has taken steps to abrogate the collective bargaining provisions of the Act, evidences to this Court that the decision as to what public interest justifies compromising Federal labor policy as embodied in the Railway Labor Act clearly lies with Congress, not the Courts.

/s/ EARL R. LARSON
United States District Judge

APPENDIX D

Order of the United States District Court for the District of Minnesota, Denying Preliminary Injunction, dated December 2, 1970

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

No. 4-70-Civ. 424

ORDER DENYING PRELIMINARY INJUNCTION

NORTHWEST AIRLINES, INC.,

Plaintiff,

—vs.—

THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendant.

On November 24, 1970, defendant notified plaintiff that beginning November 27, 1970, 0501 C.S.T., Northwest Pilots will refuse to cross the picket lines of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), and will not operate Northwest aircraft during the current labor dispute.

On November 26, 1970, this Court issued a Temporary Restraining Order directing defendant to cancel the notice, and set a hearing on a request for a preliminary injunction for December 2, 1970, at 9:00 A.M. The motion for preliminary injunction asks that the defendant, its members, etc., be enjoined from authorizing or taking part in, or threatening to authorize or take part in, a strike or concerted refusal to work for plaintiff in the form of a refusal to cross picket lines established by BRAC, or otherwise any

interruption of plaintiff's operations, until the procedures for settling disputes as provided in the agreement and the System Board Agreement and by the Railway Labor Act have been exhausted. The motion is essentially that defendant and its members be enjoined from honoring the picket lines established by BRAC in its five month strike against plaintiff.

The Court has considered the exhibits, offers of proof and testimony and the briefs and arguments of counsel.

The Court concludes that plaintiff has not shown substantial probability of success on the merits. Plaintiff may have shown irreparable injury, though this cannot now be measured in the absence of information as to mutual aid assistance. The granting of the preliminary injunction will substantially impair the interests of the defendant in that for a much longer time will a substantial number of the pilots be unemployed. The public interest has already been affected by limited operations and will be affected unfavorably by a complete shutdown. The public interest will, however, be affected favorably if complete airline service is resumed as soon as possible.

On all the files and proceedings herein,

IT IS ORDERED:

That the plaintiff's motion for a preliminary injunction be, and it is hereby, denied.

/s/ EARL R. LARSON
United States District Judge

Memorandum to be filed.

APPENDIX E

(Statutory Provisions Involved)

Section 2, First of the Railway Labor Act

Sec. 2. First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2, Second of the Railway Labor Act

Sec. 2. Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Section 5, First of the Railway Labor Act

Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

SECTION 6 OF THE RAILWAY LABOR ACT

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time

shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

SECTION 204 OF THE RAILWAY LABOR ACT

SEC. 204. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief of operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of ad-

justment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of Section 3, Title I, of this Act.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

SECTION 1 OF THE NORRIS-LAGUARDIA ACT

Sec. 1. That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

SECTION 2 OF THE NORRIS-LAGUARDIA ACT

Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are here-

in defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

SECTION 4 OF THE NORRIS-LAGUARDIA ACT

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or in prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Appendix E—Statutory Provisions Involved

Section 7 of the Norris-LaGuardia Act

Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainants property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainants property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and

surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

SECTION 8 OF THE NORRIS-LAGUARDIA ACT

Sec. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

SECTION 9 OF THE NORRIS-LAGUARDIA ACT

Sec. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving of growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

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In The

Supreme Court of the United States

October Term, 1971

No. ~~1918~~

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

vs.

NORTHWEST AIRLINES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In The

Supreme Court of the United States

October Term, 1971

No. 1819

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

vs.

NORTHWEST AIRLINES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Respondent, Northwest Airlines, Inc., submits this Brief in opposition to the petition of Air Line Pilots Association, International, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on April 15, 1971. In accordance with Rule 40, subd. 3, of this Court, we accept the petitioner's recital of the lower court opinions*, invocation of the jurisdiction of this Court under 28 U.S.C. § 1254(1), and citation of relevant statutory provisions. However, we believe that petitioner's formulation of the question presented requires revision, and that its statement of the case is deficient in certain respects.

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*The District Court's Opinion dated December 22, 1970, now is officially reported at 325 F. Supp. 994.

QUESTION PRESENTED

Whether a federal court has jurisdiction to issue an injunction to preserve the status quo pending resolution by an Airline System Board of Adjustment of a dispute over the meaning and application of a collective bargaining agreement between an air carrier and a union representing certain of the carrier's employees.

STATEMENT OF CASE

This is a suit to enjoin petitioner Air Line Pilots Association, International [hereinafter "ALPA"] from engaging in a concerted refusal to cross the picket lines of a sister union engaged in a strike against respondent Northwest Airlines, Inc. [hereinafter "NWA"], pending resolution by the NWA-ALPA System Board of Adjustment of the question of ALPA's right to do so under an existing collective bargaining agreement. The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1337.

NWA, a Minnesota corporation, is an air carrier engaged in domestic and international operations. ALPA has been and is now the duly designated collective bargaining representative of the airline pilots employed by NWA. Effective July 1, 1969, after a one-day strike, NWA and ALPA entered into a collective bargaining agreement covering rates of pay, rules and working conditions for NWA employees represented by ALPA [hereinafter "the AGREEMENT"]. This AGREEMENT was in full force and effect at the time of the events at issue in this proceeding, though it subsequently has become "open" for negotiation. In the interim and during all material times, pursuant to the specific terms and underlying policies of the Railway Labor Act [45 U.S.C. § 151 *et seq.*], which are expressly designed to preclude work stoppages, NWA and ALPA have established detailed ad-

ministrative machinery for the disposition of all "minor disputes" which may arise during the life of the AGREEMENT concerning interpretation and application thereof.[1]

On July 8, 1970, at approximately 1:00 a.m., certain of NWA's clerical, office, fleet and passenger service employees represented by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees [hereinafter "BRAC"] commenced a strike against NWA in a "major dispute" over the terms of a collective bargaining agreement. As a part of that strike action, BRAC pickets and banners were present at NWA's facilities in Minnesota and elsewhere throughout the strike. Nevertheless, NWA continued in partial and increasing operation during the BRAC strike and the pilots represented by ALPA continued, until the action which precipitated this proceeding, to bid and fly available schedules on NWA's system according to NWA's posting of schedules under the AGREEMENT [Section 11].

On October 8, 1970, Charles H. Ruby, President of ALPA, sent a telegram to NWA advising that commencing at 5:01 a.m., Central Daylight Time, October 13, 1970, all NWA pilots represented by ALPA would refuse to cross the BRAC picket lines. Upon receipt of this telegram, NWA invoked the jurisdiction of the NWA-ALPA System Board of Adjustment by a Submission. NWA also sent a telegram to the National Mediation Board requesting it to advise NWA of the availability of its services and requesting an interpretation of a Mediation Agreement entered into by NWA and ALPA on June 13, 1969. Thereafter, on October 10, 1970, NWA commenced this action in the above Court seeking in-

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[1]Section 32 of the AGREEMENT and the separate agreement establishing a System Board of Adjustment [hereinafter "the System Board Agreement"].

junctive relief requiring ALPA to cancel its notice of refusal to cross BRAC picket lines, pending resolution of the dispute by the System Board and/or the National Mediation Board.

On October 12, 1970, counsel for both parties appeared before the District Court to advise that a truce had been reached whereby ALPA would cancel its aforementioned notice and NWA would withhold all further action before that court, the System Board of Adjustment and the National Mediation Board. This agreement was confirmed by telegram from Charles H. Ruby dated October 12, 1970. NWA complied with the terms of this telegram, and the pilots thereupon continued to bid and fly their posted schedules.

On November 24, 1970, Ruby broke the truce and sent another telegram to NWA again advising that commencing at 5:01 a.m., Central Standard Time, November 27, 1970, all NWA pilots represented by ALPA would refuse to cross the BRAC picket lines. Upon receipt of this telegram, NWA again invoked the jurisdiction of the System Board of Adjustment by a Submission, and it also again sent a telegram to the National Mediation Board requesting the Board to advise NWA of the availability of its services and requesting an interpretation of the aforementioned Mediation Agreement. Thereafter, NWA reactivated its request for injunctive relief from the District Court by a Supplemental Complaint, and counsel for both parties appeared before that court on November 25, 1970 on NWA's application for a temporary restraining order.

On November 26, 1970, the District Court issued a temporary restraining order requiring ALPA to withdraw its action scheduled for November 27, 1970, and the court set December 2, 1970 for hearing on NWA's motion for a preliminary injunction. Following that hearing, the District Court

denied NWA's motion and dissolved the temporary restraining order, effective December 4, 1970 at 5:01 a.m., Central Standard Time. The remainder of the procedural history involved in this litigation has been set forth in petitioner's Statement of the Case [pp. 8-9] and will not be repeated here.

ARGUMENT

INTRODUCTION

Under Rule 19 of this Court, review on a writ of certiorari will be granted only where there are "special and important reasons" therefor. The strict standard which a petitioner for a writ of certiorari must meet has been articulated many times by this Court. It is clear that petitioner here has not met its burden of demonstrating the presence of such reasons. The decision of the Eighth Circuit Court of Appeals in this case is not only consistent with principles established in decisions of this Court, but in fact is required by those decisions. Furthermore, the Eighth Circuit's decision in no way conflicts with that of the Fifth Circuit in *Brotherhood of Locomotive Firemen and Enginemen v. Florida East Coast Ry.*, 346 F.2d 673 (5th Cir. 1965). Finally, the Eighth Circuit's decision is not only consistent with the statutory collective bargaining structure, but in fact is required to protect the integrity of the statutory and contractual provisions for the resolution of disputes such as that in this case. For these reasons, respondent urges that the petition for a writ of certiorari should be denied.

I. THE COURT OF APPEALS' DECISION IS NOT ONLY CONSISTENT WITH PRINCIPLES ESTABLISHED IN DECISIONS OF THIS COURT, BUT IN FACT IS REQUIRED BY THOSE DECISIONS.

Petitioner contends that the decision of the Eighth Circuit Court of Appeals conflicts with principles established by this Court in dealing with questions arising under the Railway Labor Act and the Norris-LaGuardia Act. It is not surprising that petitioner is unable to cite any relevant authority for this proposition, since this Court's decisions over the past three decades, culminating with that in *Chicago & Northwestern Ry. v. United Transp. Union*, 39 U.S.L.W. 4641 (U.S. June 1, 1971), establish without question that in order to protect the integrity of the statutory framework established by the Railway Labor Act, federal courts are empowered to grant injunctive relief under that Act notwithstanding the provisions of Norris-LaGuardia.

To be sure, Norris-LaGuardia, 29 U.S.C. § 101, et seq. [the so-called "anti-injunction" statute], circumscribes the power of a federal court to grant injunctions in the context of some labor disputes. Thus when carriers [or their employees or representatives] sought injunctive relief from the federal courts in order to preserve the status quo while the procedures outlined by the Railway Labor Act were pursued, it was inevitable that a clash would occur between the underlying policy of the Norris-LaGuardia Act [to limit the "intermeddling" of federal courts in labor disputes] and the underlying policy of the Railway Labor Act [to provide for the orderly adjustment of disputes in the railroad and airline industry so as not to interrupt the flow of commerce].

In one of the leading cases involving this "clash," *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30 (1957), the railroad submitted several "minor

disputes"[2] arising under the collective bargaining agreement to the National Railroad Adjustment Board after negotiations over them had been unproductive. In response, the union issued a strike call, and the railroad sought and obtained injunctive relief from the federal district court. In holding that injunctive relief was appropriate, this Court discussed the apparent conflict between the Norris-LaGuardia Act and the Railway Labor Act:

> The only question which remains in whether the federal courts can compel compliance with the provisions of the Act to the extent of enjoining a union from striking to defeat the jurisdiction of the Adjustment Board. The Brotherhood contends that the Norris-LaGuardia Act has withdrawn the power of federal courts to issue injunctions in labor disputes. That limitation, it is urged, applies with full force to all railway labor disputes as well as labor controversies in other industries.
>
> We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable.
>
> In adopting the Railway Labor Act, Congress endeavored to bring about stable relationships between

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[2]This Court has, itself, devised the terms "minor disputes" for disagreements concerning the interpretation of an existing contract, and "major disputes" which arise when a new contract is sought. Pursuant to 45 U.S.C. § 152 First, Second and Sixth, air carriers are obligated to establish an internal grievance procedure for the processing of "minor disputes"; and if that internal procedure does not resolve the dispute, then the matter may be submitted to an Airline System Board of Adjustment, which *must* be created pursuant to the mandate of 45 U.S.C. § 184. The parties to a "minor dispute" then are bound by the results of this administrative adjudicatory process established by the Act. In the instant case, NWA and ALPA have complied with the mandate of 45 U.S.C. § 152 First, Second and Sixth by establishing a grievance procedure in Section 32 of the AGREEMENT; they also have complied with the mandate of 45 U.S.C. § 184 by establishing a System Board of Adjustment under the separate System Board Agreement.

labor and management in this most important national industry. It found from the experience between 1926 and 1934 that the failure of voluntary machinery to resolve a large number of minor disputes called for a strengthening of the Act to provide an effective agency, in which both sides participated, for the final adjustment of such controversies. Accumulation of these disputes had resulted in the aggregate being serious enough to threaten disruption of transportation. Hence, with the full consent of the brotherhoods, the 1934 amendment became law.

The Norris-LaGuardia Act, on the other hand, was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining. The Act aimed to correct existing abuses of the injunctive remedy in labor disputes. Federal courts had been drawn into the field under the guise either of enforcing federal statutes, principally the Sherman Act, or through diversity of citizenship jurisdiction. In the latter cases, the courts employed principles of federal law frequently at variance with the concepts of labor law in the States where they sat.

Congress acted to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital. Rep. LaGuardia, during the floor debates on the 1932 Act, recognized that the machinery of the Railway Labor Act channeled these economic forces, in matters dealing with railway labor, into special processes intended to compromise them. Such controversies, therefore, are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative.

In prior cases involving railway labor disputes, this Court has authorized the use of injunctive relief to vindicate the processes of the Railway Labor Act. *Virginian R. Co. v. System Federation No. 40*, 300 U.S. 515, was an action by the union to enjoin compliance with the Act's provisions for certification of a bargaining representative. The question raised was whether a federal

court could issue an injunction in a labor dispute. The Court held:

> "It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of § 2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act." *Id.* at 563.

In *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, and other similar cases, the Court held that the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act.

> "Our conclusion is that the District Court has jurisdiction and power to issue necessary injunctive orders [to enforce compliance with the requirements of the Railway Labor Act] notwithstanding the provisions of the Norris-LaGuardia Act." *Id.* at 774.

This is a clear situation for the application of that principle.

Id. at 39-42.[3]

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[3]It is upon the principal authority of this case that the Eighth Circuit Court of Appeals in the so-called Boiler Operators Case, *International Ass'n of Machinists v. Northwest Airlines, Inc.*, 304 F.2d 206 (8th Cir. 1962), held that a federal court may enjoin strike activities on the part of a union in order to protect the processing of a "minor dispute" in the manner established by the Railway Labor Act and the collective bargaining agreement entered into pursuant thereto. Also, in an earlier case arising out of a separate dispute, *Northwest Airlines, Inc. v. International Ass'n of Machinists*, 178 F. Supp. 825 (D. Minn. 1959), Judge Devitt issued a preliminary injunction against the union's strike activities since it had not complied with the statutory and contractual processes in connection with a "minor dispute". In doing so, even in the absence of an express no-strike clause in the contract, Judge Devitt characterized the union's conduct as "a deliberate and intentional interference with plaintiff's operations contrary to the spirit and purpose of the Railway Labor Act." Id. at 827.

This Court also has held, prior to the *Chicago River* case, that a party to a "major dispute"[4] may be restrained from using self-help unless and until the established procedures for resolution of such disputes have been exhausted. *Brotherhood of R.R. Trainmen v. Toledo, Peoria & Western R.R.*, 321 U.S. 50 (1944). *See also, Elgin, Joliet & Eastern R.R. v. Burley*, 325 U.S. 711 (1944) [recognizes that the parties to a "major dispute" are not entitled to employ self-help prior to exhaustion of the statutory procedures].

Clearly, then, this Court's decisions establish that parties to either a "major dispute" or a "minor dispute" are obligated to utilize the statutory procedures outlined by the Railway Labor Act. In the last three years, this Court has further extended its rulings to provide even greater protection for processing labor disputes in accordance with statutory and contractual requirements. Thus, in the *Detroit and Toledo Shoreline R.R. v. United Transp. Union*, 396 U.S. 142 (1969), this Court held that the "status quo" to be preserved pending processing of the dispute included not only the precise terms of the collective bargaining agreement, but also included the "actual, objective working conditions" out of which the dispute arose.

Moreover, the concern of this Court that parties to collective bargaining agreements abide by the provisions of those agreements, and the statutes applicable thereto, has been manifested further in a context not involving the Railway Labor Act. In *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), this Court held that the Norris-LaGuardia Act does not bar granting injunctive relief to an

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[4]Unlike the parties to a "minor dispute," who are bound by the results of the mandatory adjudicatory process established by the Railway Labor Act, the parties to a "major dispute" are free to exercise self-help after exhausting the mediatory process established by the Act for such disputes.

employer against a strike in breach of a no-strike clause in a collective bargaining agreement, thus making the no-strike clause specifically enforceable under Section 301(a) of the Labor Management Relations Act. This decision overturned a line of decisions which had held that the federal court injunctive power was not available to enforce the grievance and arbitration procedures established by parties governed by the Labor Management Relations Act.[5]

Most recently, this Court's continuing awareness of the need for preserving the integrity of the statutory and contractual procedures to promote stability between labor and management, most particularly in the area of national transportation, now has culminated in its decision in *Chicago & Northwestern Ry. v. United Transp. Union*, 39 U.S.L.W. 4611 (U.S. June 1, 1971). There the parties had negotiated to impasse over the terms of a new agreement, and admittedly all of the statutory procedures for the resolution of the major dispute have been exhausted. When the union then threatened to strike, the railroad sought injunctive relief against the strike on the ground that the union had failed to perform its obligations under 45 U.S.C. § 152 First "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions."[6]

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[5]This Court also has held, as approved in *Boys Markets*, that an implied no-strike clause arises as the quid pro quo to an agreement to submit interpretation disputes to arbitration. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95 (1962), discussed in more detail at pp. 16-17, *infra*.

[6]This section provides in full as follows: "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

In response, the union contended, as does ALPA here, that the Norris-LaGuardia Act deprived the federal district court of jurisdiction to issue such an injunction.

In delivering the opinion of the Court, Mr. Justice Harlan framed the issues as follows:

> "The narrow questions presented to us are whether § 2 First imposes a legal obligation on carriers and employees or is a mere exhortation; whether the obligation is enforceable by the judiciary; and whether the Norris-LaGuardia Act strips the federal courts of jurisdiction to enforce the obligation by a strike injunction."

39 U.S.L.W. at 4642. Citing several of the Court's prior opinions, as well as the legislative history of the Railway Labor Act, Mr. Justice Harlan then articulated the Court's rulings on these issues:

> 1. Section 2 First [45 U.S.C. § 152 First] of the Railway Labor Act is more than a mere statement of policy; rather, it imposes a legal obligation.
>
> 2. This legal obligation is enforceable by "appropriate judicial means."
>
> 3. The Norris-LaGuardia Act establishes no bar against such judicial enforcement where a strike is threatened in violation of the general provisions of the Railway Labor Act requiring the parties "to exert every reasonable effort to make and maintain agreements."

Thus, as recently as a few weeks ago, this Court has made manifestly clear that a perfunctory exhaustion of statutory and contractual processes will not suffice. This being so, how much more clear it is that a *complete failure*, such as ALPA's, to exhaust those procedures justifies, and in fact demands, full utilization of the injunctive powers of the federal courts. The Eighth Circuit Court of Appeals focused precisely on this point in granting injunctive relief pending processing the dispute through the mandatory procedures. Yet, ALPA now suggests that the Eighth Circuit's decision

is "inconsistent" with the principles laid down by this Court.

In support of this proposition, ALPA refers to three cases. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969); *Atlantic Coast Line R.R. v. Brotherhood of R.R. Trainmen*, 385 U.S. 20 (1966); *Brotherhood of Ry. Clerks v. Florida East Coast Ry.*, 384 U.S. 238 (1966). In each of those cases, this Court held only that once all of the mandatory procedures for the resolution of "major disputes" have been exhausted, then self-help may be invoked by both parties to the dispute in their quest for a more advantageous contract. Nothing in these cases even remotely suggests that such self-help is available to a party who, like ALPA, has exhausted none of the mandatory processes. In fact, this Court in these cases has continued to support the principle that the crux of the Railway Labor Act is the duty "to exert every reasonable effort to make and maintain agreements" while passing through a deliberately long, drawn-out statutory procedure before resorting to self-help.

In the instant case, BRAC, having exhausted all of the statutory procedures in connection with its "major dispute" with NWA, had become free to strike in accordance with the principle of these decisions, and it did so. However, ALPA now contends that not only does this principle authorize *BRAC* to strike against NWA, but also "implicit" in that principle is the "corollary right of non-striking employees to honor those picket lines," thus effectively joining the BRAC strike. We submit that not only is there no implicit authority in the decisions of this Court for such irresponsible conduct, but in fact there is explicit authority directly prohibiting such conduct, as outlined earlier in this Part I. Indeed, had the Eighth Circuit not granted injunctive relief against ALPA's proposed strike, then its decision would have been

completely inconsistent with the principles established by this Court's prior decisions.

II. THE COURT OF APPEALS' DECISION IN NO WAY CONFLICTS WITH THAT OF THE FIFTH CIRCUIT COURT OF APPEALS IN BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN V. FLORIDA EAST COAST RY., 346 F.2d 673 (5th CIR. 1965).

Examination of the Fifth Circuit's decision in *Brotherhood of Locomotive Firemen and Enginemen v. Florida East Coast Ry.*, 346 F.2d 673 (5th Cir. 1965), reveals no conflict whatsoever with the Eighth Circuit's decision in the instant case. In the Fifth Circuit case, the plaintiff carrier, unlike NWA in the instant case, sought to enjoin sympathetic refusals to perform services by employees of *another carrier* on the ground that such other employees were engaged in a "minor dispute" with their own employer which *affected* the plaintiff. The Court denied the injunctive relief expressly on the ground that one employer is not entitled to injunctive relief in connection with a "minor dispute" between another employer and its employees. The Court declined to make any holding with respect to the right to injunctive relief if the striking employees' own employer had sought such relief. Thus, the purported "conflict" is illusory.

Furthermore, three recent decisions of the Fifth Circuit Court of Appeals establish that that Circuit is perfectly in accord with the principles articulated by this Court and the decision of the Eighth Circuit in the instant case. In *Ruby v. Taca Int'l Airlines*, 439 F.2d 1359 (5th Cir. 1971), ALPA [the same petitioner as in the instant case] sought to obtain injunctive relief, claiming that it had a major dispute with the carrier which had not yet been processed through the statutory procedures for the handling of such a dispute. The

Fifth Circuit agreed, citing the prior decisions of this Court, and it granted ALPA the requested injunctive relief.[7]

In *Atlanta & West Point R.R. v. United Transp. Union*, 439 F.2d 73 (5th Cir. 1971), the court discussed at length the underlying policy of the Railway Labor Act, as well as this Court's prior decisions in the *Jacksonville Terminal, Detroit & Toledo Shoreline* and *Chicago River* cases, among others, in finding that injunctive relief should issue.[8] And in *Railway Express Agency, Inc. v. Brotherhood of Ry., Airline & S. S. Clerks*, 437 F.2d 388 (5th Cir. 1971), the court held, in the context of a minor dispute, that injunctive relief was appropriate pending resolution thereof through the statutory and contractual processes.

Again then, had the Eighth Circuit held otherwise in the instant case, it would have subjected itself to a legitimate charge of "conflict" with the recent rulings of the Fifth Circuit Court of Appeals.[9]

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[7]The Fifth Circuit also disposed of the carrier's contention that the entire proceeding was rendered moot by the parties' invocation of the statutory procedures. ALPA argued, and the court held, that the carrier had neither expressly nor implicitly abandoned its original objections to the District Court's entry of injunctive relief, and therefore the matter certainly was not moot. In the instant case, ALPA contended before the Eighth Circuit on rehearing that the entire controversy between NWA and ALPA is moot because the BRAC strike is over. However, ALPA refused to concede that it had no right to instruct its members to refuse to cross the BRAC picket lines. The Eighth Circuit appropriately held, as had the Fifth Circuit in the *Ruby* case, that the matter definitely was not moot.

[8]Significantly, the Fifth Circuit also found that its exercise of jurisdiction in granting injunctive relief did not hinge upon classification of the dispute either as "major" or "minor", since in either event injunctive relief may be appropriate. *Atlanta & West Point R.R. v. United Transp. Union*, 439 F.2d at 78.

[9]Petitioner also alludes to the District Court decision in *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 190 F. Supp. 495 (W.D. Wash. 1961). However, the authoritative value of that case is diminished to virtually nothing by virtue of the Eighth Circuit's decision in *International Ass'n of Machinists v. Northwest Airlines, Inc.*, 304 F.2d 206 (8th Cir. 1962). See p. 20, n. 11, *infra*.

III. THE COURT OF APPEALS' DECISION IS NOT ONLY CONSISTENT WITH THE STATUTORY COLLECTIVE BARGAINING STRUCTURE, BUT IN FACT IS REQUIRED TO PROTECT THE INTEGRITY OF THE STATUTORY AND CONTRACTUAL PROVISIONS FOR THE RESOLUTION OF DISPUTES SUCH AS THAT IN THIS CASE.

We contend that the Eighth Circuit appropriately granted the requested injunctive relief in the instant case since the dispute at issue is a "minor dispute," and therefore NWA is entitled to injunctive relief to protect the integrity of the statutory and contractual procedures required for the resolution of such a dispute. In the alternative, even if the dispute at issue in the instant case is deemed neither a "major dispute" nor a "minor dispute," plaintiff is entitled to injunctive relief to protect the integrity of and effectuate the policies of the Railway Labor Act.

A. The Dispute at Issue in the Instant Case Is a "Minor Dispute," and Therefore NWA Is Entitled to Injunctive Relief to Protect the Integrity of the Statutory and Contractual Procedures Required for the Resolution of Such a Dispute.

As noted in the Statement of Case, Section 32 of the AGREEMENT between NWA and ALPA and the separate System Board Agreement provide a detailed machinery, as required by 45 U.S.C. § 152 First, Second and Sixth and § 184, for the resolution of disputes involving interpretation or application of the AGREEMENT. To be sure, the AGREEMENT does not contain an *express* no-strike clause. However, this Court specifically has held that where a detailed machinery for resolution of disputes is provided, the collective bargaining agreement between the parties is deemed to contain an *implied* no-strike clause whereby the union agrees not to strike unless and until the grievance and

arbitration procedures have been exhausted. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95 (1962); *accord, New York Mailers' Union No. 6, I.T.U. v. NLRB*, 327 F.2d 292 (2d Cir. 1964). In the *Lucas Flour* case, Mr. Justice Stewart wrote as follows:

> Whether, as a matter of federal law, the strike which the union called was a violation of the collective bargaining contract is thus the ultimate issue which this case presents. It is argued that there could be no violation in the absence of a no-strike clause in the contract explicitly covering the subject of the dispute over which the strike was called. We disagree.
>
> The collective bargaining contract expressly imposed upon both parties the duty of submitting the dispute in question to final and binding arbitration. In a consistent course of decisions the Courts of Appeals of at least five Federal Circuits have held that a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement. The National Labor Relations Board has reached the same conclusion. *W. L. Mead, Inc.*, 113 N.L.R.B. 1040. We approve that doctrine. To hold otherwise would obviously do violence to accepted principles of traditional contract law. Even more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare. See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

Id. at 104-06.

Prior to the *Lucas Flour* decision, various commentators already had recognized the inherent logic of this argument. Thus, in Teller, *Labor Disputes and Collective Bargaining*, § 277 (1947 Supp.), the following language appears:

> Whether a collective bargaining agreement does or does not contain a no-strike clause, a strike, called during

> the term of the agreement, would be a breach of the agreement. The no-strike clause is simply inserted so that all employees may be apprised clearly of their obligation, but it is not legally necessary. This seems clear from the fact that continuity of production is one of the main reasons for the execution of a collective bargaining agreement for a specific term.

Archibald Cox, an outstanding expert in the field of labor law, echoes similar sentiments in Cox, *Some Aspects of the LMRA, 1947*, 61 Harv. L. Rev. 274, 308-309 (1948):

> Under an agreement fixing wages, hours and terms and conditions of employment for a definite period, both parties impliedly promise not to take action to compel their change before the agreement expires. If a grievance procedure is established, as is almost always the case [here it is established not only by the AGREEMENT, but by the RLA itself], one may also fairly imply an additional understanding by each party not to use economic pressure to settle a question of interpretation until the procedure has been exhausted. Either implied covenant would be sufficient consideration to make the agreement a binding contract; and, in the absence of an exculpatory clause, there should be liability for a breach of either covenant.

Thus, since the AGREEMENT between NWA and ALPA contains an express grievance and arbitration procedure, it also must be deemed to contain an implied no-strike provision. Whether that provision precludes ALPA from a sympathetic strike in the form of refusing to cross the BRAC picket lines clearly is a dispute arising out of the "interpretation or application" of the AGREEMENT [45 U.S.C. § 151a (5)] and as such is a "minor dispute."

This becomes all the more apparent when one considers Section 23 of the AGREEMENT pertaining to loss of seniority for refusal to report for work upon NWA's orders to do so. If NWA were to discharge each pilot who, in response to ALPA's orders, disobeyed those of NWA and refused to

cross the BRAC picket lines or fly, certainly ALPA would never concede that it could not file grievances on such discharges and request a System Board's decision on NWA's application of Section 23 to such a refusal to work without processing the discharges through the investigation and discipline procedures outlined in Section 31 of the AGREEMENT. This being true, ALPA then must also concede that it has no right to deny NWA's right to grieve over ALPA's orders to its members not to cross picket lines in lieu of the more severe act of discharging them, which obviously would not aid in either maintaining the AGREEMENT or avoiding interruptions in interstate air commerce.

In such circumstances, there is a clear "minor dispute" over the interpretation of Section 23 and its application to the instant set of facts. NWA claims the contract permits the termination of pilots who take ALPA orders in preference to those of the employer. ALPA obviously argues that the contract means no such thing. The contractual and statutory route for settling such disputes is compulsory arbitration, which will be a wholly fruitless and futile waste if ALPA can engage in a strike which shuts down NWA until ALPA's unilateral ruling is overruled by the System Board.[10] Furthermore, NWA's remedy of discharging each pilot who

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[10]The threshold question of whether this dispute is arbitrable under the grievance and arbitration procedure of the AGREEMENT is for consideration by the court, but only according to a very strictly limited standard. Thus, this Court in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 564, 582-83 (1960), held:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Citing this precise language, the Eighth Circuit held that the AGREEMENT between NWA and ALPA is "susceptible of an interpretation" covering the dispute over refusal to cross BRAC picket lines, and thus ordered the parties to the System Board of Adjustment.

complies with ALPA's orders and refuses to cross the BRAC picket lines is totally meaningless, since its passengers still would not be transported pending the processing of the grievances created thereby. Therefore, since ALPA did not invoke the procedure outlined in Section 32 of the AGREEMENT and in the System Board Agreement for resolution of this "minor dispute," NWA did so. Consequently, NWA was entitled to injunctive relief to permit this interpretation dispute to be resolved through the orderly contractual processes. *International Ass'n of Machinists v. Northwest Airlines, Inc.*, 304 F.2d 206 (8th Cir. 1962).[11]

The question of whether the ALPA action in ordering the pilots to fly violates the AGREEMENT obviously involves an interpretation of the AGREEMENT. NWA maintains, in good faith, that the pilots may not be ordered by ALPA

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[11] This Boiler Operators Case arose out of the same set of facts present in *Northwest Airlines, Inc., v. Transport Workers Union of America AFL-CIO*, 190 F. Supp. 495 (W.D. Wash. 1961), relied upon by ALPA for the proposition that the dispute in the instant case is not a "minor dispute." In the *Transport Workers Union* case, the Court held no "minor dispute" was presented by a refusal to cross picket lines. However, we submit that that decision is not of controlling significance in view of the exactly opposite ruling of the Eighth Circuit Court of Appeals in the Boiler Operators Case that a refusal to cross picket lines in violation of a no-strike obligation does create a "minor dispute" which must be processed in accordance with the provisions of the Railway Labor Act. Also, in another case arising out of the BRAC strike, *Northwest Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers, et al.*, 323 F. Supp. 107 (D. Minn. 1970), the court ruled that a refusal to cross picket lines in defiance of NWA's orders presents a "minor dispute"; and the Eighth Circuit Court of Appeals, in its Order of November 25, 1970, directed as follows:

> [T]his Court and all parties to the action agree that the single underlying issue is whether IAM, in the light of the no-strike provisions of the bargaining agreement, retains the right to instruct its members to honor the picket lines of a sister Union.
>
> We order that this basic issue and others collateral to it be submitted by the parties to the Systems Adjustment Board without delay.

In any event, even if the present dispute is not deemed to fall precisely within the definition of a "minor dispute," Section B. of this Part III. clearly demonstrates that injunctive relief is not only appropriate, but absolutely essential.

to refuse to fly when the company has flying for them to do. ALPA asserts that the contrary is true—that ALPA can, under the contract, countermand or abort NWA's order. NWA submitted this controversy to the System Board for final and binding determination; and until it is decided that pilots have no contractual obligation to fly as ordered, the union properly is enjoined from making a unilateral change in the rules and working conditions. ALPA cannot, under the statute and the contract, be the judge of the legality of its own conduct.

B. Even If the Dispute at Issue in the Instant Case Is Deemed Neither a "Major Dispute" Nor a "Minor Dispute," NWA Is Entitled to Injunctive Relief to Protect the Integrity of and Effectuate the Policies of the Railway Labor Act.

ALPA contends that it has no "major dispute" with NWA, since it is not seeking to obtain new or modified rates of pay, rules or working conditions. It further contends that it has no "minor dispute" involving the interpretation or application of any provision of the AGREEMENT. Thus, its argument continues, its right to engage in a sympathetic refusal to cross the BRAC picket lines creates a dispute, if any, which falls into some kind of a twilight zone not cognizable under the Railway Labor Act either as a "major dispute" or as a "minor dispute," thus leaving it free to engage in whatever activity it deems appropriate.

The fallacy of this contention becomes all the more obvious when one considers the expressed purpose of the Railway Labor Act to channel all disputes between carriers and their employees or representatives into the categories of "major disputes" [which the parties are mandated to *attempt* to resolve through a *mediatory* process] or "minor disputes" [which *actually* are to be resolved through a man-

datory *adjudicatory* process]. As outlined so clearly by the Railway Labor Act, the underlying purpose of the Act is to prevent interruptions of commerce, thereby effectuating the national transportation policy articulated in the Transportation Act of 1940, 54 Stat. 899, amending the Interstate Commerce Act, 49 U.S.C. § 1, *et seq.*:

> It is hereby declared to be the national transportation policy of the Congress to . . . promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers.[12]

In the face of the underlying policy of the Railway Labor Act and the Transportation Act of 1940, ALPA still contends (1) that in the absence of an express no-strike provision in the AGREEMENT there can be no question of interpretation thereof raised by its refusal to cross the BRAC picket lines, and (2) therefore, there being no "minor dispute," a status quo injunction may not be issued. However, quite apart from any express contractual obligation not to strike [and the handling of "minor disputes" over interpretation thereof], the *Railway Labor Act* imposes a *statutory* obligation upon employers and employees to avoid interruptions in operations except in one instance only: where the parties have been unable to resolve a "major dispute" over changes in an agreement after the "Section 6" mandatory procedures of the Act have been exhausted, at which time both parties then, *and only then*, are free to exercise self-

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[12] The federal courts repeatedly have recognized the paramount need to effectuate this national policy and not to permit it to be subverted by labor disputes. See, e.g., *Montgomery Ward Co. v. Northern Pac. Terminal Co.*, 128 F. Supp. 475 (D. Ore. 1953); *Erie R. Co. v. Local 1286 Int'l Longshoremen's Ass'n*, 117 F. Supp. 157 (W.D. N.Y. 1953); *Merchandise Warehouse Co. v. A. B. C. Freight Forwarding Corp.*, 165 F. Supp. 67 (S.D. Ind. 1958); *Quaker City Motor Parts Co. v. Inter-State Motor Freight System*, 148 F. Supp. 226 (E.D. Pa. 1957).

help. This statutory obligation, manifested throughout the Act, is imposed most particularly by Section 2 First [45 U.S.C. 152 First], which, as discussed at pp. 11-12, *supra*, does impose an affirmative, judicially enforceable, legal obligation by the terms of this Court's ruling in the *Chicago & Northwestern* case.

ALPA and NWA have a currently effective and valid collective bargaining agreement which, by the terms of the foregoing provision of the Railway Labor Act, they are required to "maintain" by exerting "every reasonable effort." This mandatory, statutory judicially enforceable obligation depends in no way on the existence of an express no-strike provision in the AGREEMENT; nevertheless, ALPA contends that it is free to refuse to "maintain" the agreement without making *any* effort, let alone "every reasonable effort." Such a refusal to comply with the express provisions of the Railway Labor Act is enjoinable, and the federal courts, even prior to *Chicago & Northwestern*, have so held.

In *Chicago & Illinois Midland R.R. v. Brotherhood of R.R. Trainmen*, 315 F.2d 771 (7th Cir. 1963), *cert. denied and judgment vacated as moot*, 375 U.S. 18 (1963), the court enjoined the refusal of a carrier's employees to cross a picket line established at the plaintiff's plant on the ground that such refusal was a violation of the Railway Labor Act because the union had made no "attempt to comply with the Railway Labor Act provisions." *Id.* at 775. In response to the union's argument that the plaintiff carrier had failed to comply with the provisions of Section 2 First and Second of the Act, the court noted that it was the *union* which had disturbed the status quo without any attempt to comply with those same provisions. The court spent no time determining whether the dispute could be termed "major" or "minor", but rather enjoined the union's conduct due to its failure to

comply with, and effectuate the policies of, the Railway Labor Act.

In *Pan American World Airways v. International Brotherhood of Teamsters*, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd on opinion below*, 401 F.2d 938 (2d Cir. 1969), the court held that a strike by one of two competing unions to compel a company to bargain with it during the pendency of a representation petition before the National Mediation Board could be enjoined, even though the dispute between the carrier and the unions was deemed to be neither "major" nor "minor" in the customary sense. The same was true in *Long Island R.R. v. System Federation No. 156*, 368 F.2d 50 (2d Cir. 1966), in which the court enjoined a slow-down and work stoppage which immobilized and delayed the plaintiff's trains, even though the action was the result of an internal union power struggle and involved a dispute which was neither "major" nor "minor" in the customary sense. Quoting Section 2 First of the Railway Labor Act, the court held that the union conduct was a "flagrant violation of the Act." [13]

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[13] Two other cases involving the Long Island Railroad also raised the same issue. In *Long Island R.R. v. Brotherhood of Locomotive Engineers*, 290 F. Supp. 100 (E.D. N.Y. 1968), the union protested regulations put into effect by the owner of Penn Station [not the employer in question] and threatened to strike unless the regulations were rescinded. The court enjoined the strike as unlawful without categorizing it as one over either a "major" or "minor" dispute. In *Long Island R.R. v. System Federation No. 156*, 289 F. Supp. 119 (E.D. N.Y. 1968), the court issued an injunction against work slowdowns resulting from the "concern by union members about possible reductions in work force by new officials of the railroad." In doing so the court said:

> Due to the indefiniteness of the union's grievances, it is not clear whether the differences between the parties may best be settled by the National Mediation Board, the National Railroad Adjustment Board, or a special adjustment board as provided by 45 U.S.C.A. Section 153 Second. It need not be decided which board is appropriate or whether this dispute is major or minor in nature.

Id. at 126.

Again, then, whether or not the current dispute between NWA and ALPA may be classified as a "minor dispute" over the interpretation of the AGREEMENT really is immaterial. What is material is that the Railway Labor Act itself imposes important and serious obligations on both parties, with which ALPA has made no attempt to comply, in order to effectuate the purposes of the Railway Labor Act and the Transportation Act of 1940. To allow ALPA to ignore these obligations and make a unilateral determination to refuse to cross BRAC picket lines, simply on the ground that the existing collective bargaining agreement contains no express no-strike clause, would be to hold that the union is free to strike during the term of an effective agreement over *anything* that it claims does not fall strictly within the customary definitions of a "major dispute" or "minor dispute." For example, ALPA would be free to strike in protest against actions of other employers, and in protest against, or in support of, actions of other unions. In fact, it would leave ALPA free to strike for *any* reason, or even for *no discernible reason*, provided only that no strike be called over a dispute referable to the System Board of Adjustment or during the pendency of the processes of the Act in connection with a "major dispute." Certainly, such emasculation and destruction of the Railway Labor Act cannot be permitted, and has not been permitted by any court. Whether a dispute be considered "major" or "minor," or some other kind of "dispute," NWA is entitled to the requested injunctive relief.[14]

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[14] If the dispute be deemed some other kind of dispute which is neither "major" nor "minor," 45 U.S.C. § 183 (b) permits the parties to refer the matter to the National Mediation Board. Therefore, in an effort to do everything possible to invoke the appropriate administrative procedures, NWA forwarded a telegram to the National Mediation Board requesting its advice as to the availability of its services under the foregoing provision, and requesting such services, if available.

CONCLUSION

The decision of the Eighth Circuit Court of Appeals in this case is not only consistent with principles established in decisions of this Court, but in fact is required by those decisions. Furthermore, the Eighth Circuit's decision in no way conflicts with that of the Fifth Circuit in *Brotherhood of Locomotive Firemen and Enginemen v. Florida East Coast Ry.*, 346 F.2d 673 (5th Cir. 1965). Finally, the Eighth Circuit's decision is not only consistent with the statutory collective bargaining structure, but in fact is required to protect the integrity of the statutory and contractual provisions for the resolution of disputes such as that in this case. Therefore, we submit that this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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